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Ius Defensionis: Fulcrum of Justice in the Rotal Jurisprudence

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Introduction

Holy Mother Church always recognizes the call for it to be *speculum iustitiae* (mirror of justice) before the world.[1] In order to realize this nature of the Church as "a mirror of justice" in its very life, those who are engaged in the administration of justice, whether in the tribunals or any structures of the Church, are bound by the duty of their office to act always in accordance with the sacred discipline of the Church. Generally, the Church realizes its nature as "a mirror of justice", through its judicial wing which deals with innumerable cases of various natures, one of which is the case concerning the declaration of nullity of marriage. For cases of this type, the sacred discipline is not restricted to the canons of *CIC* 1983, but includes also the jurisprudence of the Church. Recognizing the generality of the motives of nullity of sentence established in legislation, it is always necessary that one understands the common jurisprudence of the Roman Rota in order to administer justice or to conduct a case with meticulous attention. One of the vital elements which the Roman Rota

[1] Cf. John Paul II, Allocution to the Roman Rota (26 January 1989), n. 10, in *AAS* 81 (1989), 927: "Il compito della Chiesa, e il merito storico di essa, di proclamare e difendere in ogni luogo e in ogni tempo i diritti fondamentali dell'uomo, non la esime, anzi la obbliga ad essere davanti al mondo *speculum iustitiae*"; cf. Id., Allocution to the Roman Rota (17 February 1979), in *AAS* 71 (1979), 423; Id., "The Judicial Function in the Life of the Church", in *The Pope Speaks* 24 (1979), 218.

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always laid emphasis on in rendering justice is the right of defence (*ius defensionis*) of the parties during the course of the trial. This right of defence pertains to the procedural aspect of the trail. There are many sentences of the Roman Rota which have dealt with cases in which the right of defence had been infringed upon at the lower tribunals and these Rotal sentences have always insisted upon the utmost importance of observing the prescripts that respect the provisions for the right of defence. Rotal judges have always declared the sentences of lower tribunals null when the right of defence was violated. According to the Roman Rota, "*Audiatur et altera pars*" (let the other party be heard) is an indispensable element in the trial. One, who administers justice in marriage nullity cases, might not infringe the prescripts for the exercise of the right of defence of the parties whereby one is able to realize his or her right to be heard. The judge can render justice to the parties and to the case, when he or she meticulously observes the prescripts of the law for the exercise of the right of defence.

The first part of this article briefly examines the concept of jurisprudence and the second analyzes eight Rotal cases *vis-à-vis* right of defence. The third part pertains to clarity regarding the specific procedural formalities and principles with regard to the right of defence which have evolved out of the Rotal decisions and decrees in the past. These principles are a great help in applying the law while conducting the trial for the declaration of nullity of marriage and for safeguarding the provisions for the right of defence whereby justice is rendered.

1 The Jurisprudence

Law, by its very nature, is universal and does not foresee every individual situation to which it is applicable. Therefore, when the law is applied to concrete cases, there arise new situations, issues and conditions which are to be carefully observed by the judge with a creative and systematic interpretation of the pertinent law. He does this by drawing upon principles and jurisprudence, found in the canonical literature and legal wisdom. In general, jurisprudence means the course of court decisions as

distinguished from legislation and doctrine. A secular meaning of the word 'jurisprudence' would imply that it is the science or philosophy of law. But then the canonical system of the Church adopted an understanding of jurisprudence from the Roman Law and its meaning has evolved during the course of time.

1.1 The Concept of Ecclesial Jurisprudence[2]

It is well known that the Latin term for jurisprudence (*iurisprudentia*)[3] adopted by the current ecclesial legislation does not retain its original meaning, coined in antiquity by Roman juridical experience as the "art of science of law"[4] that is, the art of jurists which consists in giving opinions on juridical questions even to magistrates and judges. Indeed, the current concept of canonical jurisprudence is inspired in its more narrowly used meaning by modern juridical experience, even if not shared by all juridical systems, for identifying the *cognitio* of judges and ensemble of their judicial decisions. "The canonical jurisprudence is the ensemble of consistent juridical principles that can be derived from a collection of decisions on the same matter,"[5] thus serving as a guide for judges while applying principles and criteria in order to arrive at a moral certitude.[6]

[2] Cf. P.M. Dugan – L. Navarro, *Matrimonial Law and Canonical Procedure. A Continuing Education Course*, Wilson & Lafleur Limitèe, Canada 2013, 20.

[3] It is a composition of two words: "iuris" and "prudentia" and together they express the meaning of "prudence concerning the law": cf. G. Pugliese, *Istituzioni di diritto romano*, Giappichelli, Torino 1991, 189. This is the definition of *iurisprudentia* handed down from Ulpian: "Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia" (D. 1, 1, 10, 2 [Ulp. 1 reg.] which contains two elements: awareness of divine and human things, and knowledge of what is just and unjust).

[4] V. De Paolis, "La giurisprudenza del tribunale della rota romana e i tribunali locali", in *Quaderni Dello Studio Rotale* 18 (2008), 141; cf. C. Lefebvre, "Pauli VI verba de rotali iurisprudentia necnon de studiis iuris canonici", in *Periodica* 58 (1969), 117-142; Z. Varlata, "De iurisprudentiae conceptu", in *Periodica* 62 (1973), 39-57; A. Stankiewicz, "L'unità della giurisprudenza e il ruolo della Rota Romana", in *Quaderni Dello Studio Rotale* 20 (2010), 137.

[5] E.B.O. Okonkwo, "The Pastoral Character of the Process for the Declaration of the Marriage Nullity", in *Ius Missionale* 11 (2017), 181; cf. W.L. Daniel, "The Notion of Canonical Jurisprudence and its Application to the Tribunal of the Rota and Causes of Nullity of Marriage", in *The Jurist* 74 (2016), 203.

[6] Cf. V. De Paolis, "La giurisprudenza del tribunale della rota romana e i tribunali locali", 144.

Velasio De Paolis states that the concept of jurisprudence has a dual meaning. In the primary, prevailing and objective sense it means a practical science of law, that is, "approved uniform rules of the law or by the practice to interpret and to apply the laws in the tribunal"[7] or "the complex of uniform decisions, that is, those uniformly issued by tribunals in the effective exercise of their jurisdictional function."[8] In the formal sense, jurisprudence signifies "the authority which the decisions issued in a uniform way enjoy, especially if issued by the superior tribunals such as Rota Roma or Apostolic Signatura."[9] Although jurisprudence does not normally have a normative character it can constitute a juridical source that could be used to supply a *lacuna legis*.[10] This is stated in the general norm of can. 19.[11] The study of the Rotal decisions, therefore, could also provide the principles to solve various doubts especially regarding the provisions for the right of defence and its applications during the course of the trial.

1.2 The Apostolic Tribunal of the Roman Rota

The Roman Rota[12] tribunal functions as an ordinary collegiate appeal

[7] *Ibid.*, 141: "Comprobata uniformis norma iuris dicendi seu leges practice interpretnandi et applicandi in tribunalibus."

[8] *Ibid.*: "Complexus decisionum uniformium seu uniformiter latarum a tribunalibus, in effectivo exercitio propriae functionis iurisdictionalis"; cf. Z. Varlata, "De iurisprudentiae conceptu", 41-43.

[9] V. De Paolis, "La giurisprudenza del tribunale della rota romana e i tribunali locali", 141: "In senso formale invece è la stessa autorità di cui godono tali decisioni emesse in modo uniforme, specialmente se emesse da un tribunale superiore rispetto a quelli inferiori, come possono essere la Rota o la Segnatura Apostolica."

[10] Cf. W.L. Daniel, "The Notion of Canonical Jurisprudence and its Application to the Tribunal of the Roman Rota and Causes of Nullity of Marriage", 208.

[11] Can. 19: "If a custom or an express prescript of universal or particular law is lacking in a certain matter, a case, unless it is penal, must be resolved in light of laws issued in similar matters, general principles of law applied with canonical equity, the jurisprudence and practice of the Roman Curia, and the common and constant opinion of learned persons."

[12] Cf. A. Stankiwicz, "Il tribunale Apostolico della Rota Romana", in *Quaderni dello Studio Rotale* 18 (2008), 103-113; F. Roberti, *De processibus*, Vol. 1, Pontificium Institutum Utriusque Iuris, Rome 1926, 335: Its origin dates back to the 12th century, arising from a need of a group of counselors, expert in doctrine and judicial matters – called *cappellani papae or later, auditores causarum sacri palatii apostolici* (auditorium was called a place where the Pope, together with his

tribunal of the Pontiff, competent to receive and hear all judicial appeals made by the individual faithful, bishops or any judicial persons. The judges are traditionally known as auditors.[13] They have ordinary power in cases within the competence of the tribunal. The jurisprudence of the Roman Rota is of the highest value in the canonical system of matrimonial nullity. The directive and unifying value of the jurisprudence of the Roman Rota in the matter of the nullity of marriage has been one of the richest areas of canonical teaching in the Pontifical Magisterium.[14] The Ecclesiastical judges have to follow the constant and common jurisprudence of the Church when rendering judicial decisions regarding marriage nullity. In his allocution to the Roman Rota, John Paul II said:

> We must be convinced that a serene, attentive, meditated, complete and exhaustive examination of marriage cases demands full conformity to the correct doctrine of the Church, to canon law, and to sound canonical jurisprudence, which has come to maturity above all through the contribution of the Sacred Roman Rota.[15]

counselors handled judiciary matters). This group of counsellors had to help the Pope in the instruction and study of the controversies of different sorts placed before the judgement of the Apostolic See. The word "Rota" became popular in the fourteenth century. It was at this time that the decisions consolidated by the Auditor Thomas Fastoli in the year 1336-1337 were published. However, the first official document that employed this term was the constitution of Martin V *Romani Pontificis Providentia* in 1423. To know more about the reconstruction of the origin and history of the Roman Rota: cf. P. Moneta, "Rota Romana Tribunale della", in *Enciclopedia del Diritto*, Vol. 41, Giuffrè, Milano 1989, 137f.

[13] Cf. Z. Grocholewski, "I tribunali", in P.A. Bonnet – C. Gullo (eds), *La Curia Romana nella Cost. Ap. 'Pastor Bonus'*, LEV, Città del Vaticano 1990, 415: The Rotal judges were called "auditors" officially (cf. *Regimini ecclesiae universae*, art. 109, as a reiteration of can. 1598 of *CIC* 1917 and as per *Normae Sacrae Romanae Rotae Tribunalis* of 1982, art. 1). They began to be called simply "Iudices" by *Pastor Bonus* of 1988 (artt. 122, nn. 3 and 127). Such a change is probably due to the fact that, according to the present Code, the auditor by itself is one who carries out the instructions of the case (cf. can. 1428).

[14] Cf. W.H. Woestman (ed.), *Papal Allocutions to the Roman Rota* 1939-2011, Saint Paul University, Ottawa 2011, 168, 178-179, 184-185, 189-190, 220-221, 298-301.

[15] John Paul II, Allocution to the Roman Rota (5 January 1981), in *AAS* 73 (1981), 232: "Dobbiamo essere persuasi che un esame sereno, attento, meditato, completo ed esauriente delle cause matrimoniali esige la piena conformità alla retta dottrina della Chiesa al diritto canonico ed alla sana giurisprudenza canonica, quale si è andata maturando soprattutto mediante il rapporto della Sacra Romana Rota."

He, in his another allocution to the Roman Rota, explained that the judicial sentences of the Roman Rota demand fidelity to the law and moral certitude *ex actis et probatis*.[16] In the cases of the declaration of nullity of marriage, the judges of apostolic tribunal of the Roman Rota pronounce sentences and set examples for the local tribunals to follow. Art. 126 of *Pastor bonus* clearly enumerates:

> The tribunal of the Roman Rota is a court of higher instance at the Apostolic See, usually at the appellate stage, with the purpose of safeguarding rights within the Church. It fosters unity of jurisprudence and, by virtue of its own decision, provides assistance to lower tribunals.[17]

2 The Right of Defence at the Roman Rota

A definitive decision may be irremediably or remediably null for various reasons. The *CIC* 1983 explicitly prescribes eight grounds of irremediable nullity of sentence in can. 1620[18] (cf. *DC* art. 270)[19] and six grounds for remediable nullity in can. 1622 (cf. *DC* art. 272). Hence, a decision rendered in a particular marriage nullity case can be affected either by irremediable or remediable nullity when procedural irregularities are perpetrated by tribunal personnel based on the norms enshrined in the above-mentioned canons. The Rotal decisions on plaint of nullity treat various procedural violations amounting to nullity of a court's decision. Certainly, the issues regarding the violation of the right of defence are consistently faced. Therefore, an analytical study of various Rotal sentences will be of great help to understand the utmost importance of the right of defence and draw out various principles in order to apply in the procedure for the matrimonial cases.

[16] Cf. John Paul II, Allocution to the Roman Rota (4 February 1980), in *AAS* 72 (1980), 177, n. 8.

[17] John Paul II, Apostolic Constitution *Pastor bonus* (28 June 1988), art. 126, in *AAS* 80 (1988), 892: "Hoc Tribunal instantiae superioris partes apud Apostolicam Sedem pro more in gradu appellationis agit ad iura in Ecclesia tutanda, unitati iurisprudentiae consulit et, per proprias sententias, tribunalibus inferioribus auxilio est"; cf. V. De Paolis, "La giurisprudenza del tribunale della rota romana e i tribunali locali", 131-165; A. Stankiewicz, "L'unità della giurisprudenza e il ruolo della Rota Romana", in *Quaderni dello Studio Rotale* 20 (2010), 135-152.

[18] The grounds mentioned in can. 1620 are not exhaustive.

[19] *DC: Dignitas Connubii*.

2.1 *Coram* Erlebach, 7 May 1998[20]

In this case, the man petitioner lodged a petition in the tribunal of the first instance of Manila in 1993 and accused his marriage of nullity on several grounds. The judge determined the doubt on the grounds of can. 1095, 2°, 3° on the part of both the parties, carried out the instruction and pronounced an affirmative sentence on 30 March 1995. The appeal tribunal confirmed the decision based on the incapacity of the respondent to assume the obligations of the marriage. Once the decrees were issued, the respondent wrote a letter to the judicial vicar of the first grade challenging the sentence issued. On 1 June 1996, she also made appeal to the Dean of Roman Rota complaining of several procedural irregularities against the prescripts of the law amounting to the denial of the right of defence. The procedural irregularities that she complained of were that she did not receive any notification from the moment of publication of the acts in the first grade until the issuance of the decree of confirmation, including the failure of notification of the sentence of the first grade. She stated that both the decisions with the first instance and the appellate court were mailed to her together in one envelope. However, she did not make a formal plaint of nullity. Later, at the insistence of the defender of the bond in his *votum* on 27 May 1997, plaint of nullity was inscribed. Therefore, the nullity of the sentence of the first grade and of the confirmatory decree was stated as questions to be answered.

In the *in iure* part, the Rotal judge, Erlebach, makes an observation that in Rota the plaint of nullity is often proposed due to the denial of the right of defence according to the norm of can. 1620, 7° (*DC* art. 270, 7°). The judge insists on the importance of examining in depth the right of defence within the parameter of ordinary contentious process meant for the declaration of nullity of marriage, considering very meticulously the import of can. 1691. He, quoting the sentence of Rotal judge, Mannucci, observes, "right of defence is an essential element of the trial itself and it is

[20] Cf. *Coram* Erlebach, 7 May 1998, *RRDec.*, Vol. 16 (1998), 129-135.

intimately linked to the *contradictorium*."[21] Again citing the Rotal decree of Colagiovanni, Erlebach confirms that the right of defence consists in the principle of *contradictorium*. That is to say that the right of defence "consists in a process constituted through a principle of *contradictorium* which gives the possibility to the parties to know not only the ground but also the proofs so that the parties have the possibility of presenting the contrary proofs."[22]

The Rotal judge is of the opinion that the right of defence is completed through the following three fundamental moments of the process: the instruction, the publication of the acts and the discussion. The right of defence is considered to have been denied if there is proof that the judge had clearly denied the party which lacked one of these essential elements of the trial. The Rotal judge claims, "moreover, this is a matter only of the faculty granted to those who intervene in the trial and certainly not the concrete exercise of the faculties."[23] Therefore, "if the parties, due to the trust placed in the tribunal or renunciation of the defence, or some other reason, abstain from the exercise of the right of defence, it does not amount to nullity of the sentence."[24]

The Rotal judge, Erlebach, continues to explain the significance of the intimation of the judicial acts and its relevance to the right of defence. As the trial is carried out through written form in its various phases, it is

[21] *Coram* Erlebach, 7 May 1998, 130, n. 3: "[…] iuris defensionis est elementum essentiale ipsius iudicii, arctissime conexum cum contradictorio"; cf. *Coram* Mannucci, 27 February 1930, *RRDec.*, Vol. 22 (1930), 120, n. 4.

[22] *Coram* Colagiovanni, 21 May 1985, *RRDecr.*, Vol. 3 (1985), 121, n. 8: "ex ipsa natura processus qui constituitur per contradictorii principium, cum facultate facta cognoscendi non solum capita alligata, sed etiam probationes adductas cum possibilitate ideo respondendi et deducendi probationes contrarias."

[23] *Coram* Erlebach, 7 May 1998, 131, n. 5: "Sed, uti notum est, agitur tantum de facultate in iudico intervenientibus concessa, minime autem de harum facultatum exercitio concreto."

[24] *Coram* Ferraro, 25 November 1975, *RRDec.*, Vol. 67 (1975), 662, n. 5: "Sententiae nullitas enim invocari non potest 'si partes, ob fidem tribunali praestitam, vel ob renuntiationem defensionis aliamve ob rationem, malint quomodolibet a iure defendendi sese abstinere'"; cf. *Coram* Palestro, 18 June 1986, *RRDecr.*, Vol. 4 (1986), 95, n. 3; *Coram* Erlebach, 7 May 1998, 131, n. 5; *Coram* Agustoni, 7 November 1986, *RRDecr.*, Vol. 4 (1986), 171, n. 4.

also of paramount importance to notify the citations and other procedural acts to the interested parties in the trial. He continues to state, "hence, a decree issued by the judge and preserved in the acts does nothing without notification of that decree. The intimation of the judicial acts affects the very essence of the trial."[25] The right of defence is, in fact, seen as a subjective right of a party to be exercised in a trial. Therefore, one can certainly say that it consists of two elements, namely: 1) the right to information, which consists in the necessity of warning the parties in advance by means of notification concerning the facts, proofs and decisions; and 2) the right to hearing, which consists in "the possibility to be given to the parties of both indicating and contradicting the facts, proofs and decisions, and of introducing proofs of putting forward defence."[26] The mode of notification or intimation is to be done through public postal services or any secure method according to the norm of can. 1509 §1. The fact and the mode of notification are to be evident in the acts, without which the decisions of the judge remain invalid. The Rotal judge, Erlebach, states:

> Whatever the way to make the notifications is, it must always be clear in the records that the notification was made and in what way […], so that the decisions of the judge are not invalidated or derive also other damages.[27]

The Rotal judge tries to answer through argument the questi whether there is any violation of the right of defence from the moment publication of the acts until the issuance of the decree of confirmation. Rotal judge observes that though there is a decree of the first grade of publication of the acts on 3 January 1995, the conclusion of the cause 3 February 1995 and the decree of the 5 April 1995 of the publicatio the sentence with a mention of the right to appeal, there is no notificat

[25] *Coram* Erlebach, 7 May 1998, 131, n. 6: "Nihil ideo efficit decretum a iudice emissu in actis conservatum, tamen sine eiusdem decreti notificatione. Denuntiatio actuum iudicia tangit ipsam essentiam iudicii."

[26] *Ibid.*; cf. *Coram* Stankiewicz, 27 May 1994, *RRDecr.*, Vol. 12 (1994), 117, n. 10; C Stankiewicz, 29 March 1996, *RRDecr.*, Vol. 14 (1996), 68, n. 6.

[27] *Coram* Erlebach, 7 May 1998, 131, n. 6: "Quisquis sit modus notificationes perficiendi, se 'de facto notificationis et de eius modo constare debet in actis' […], ne decisiones iudicis i maneant vel et alia detrimenta gignant."

or note found in the acts of the first grade, sent to the Rota, regarding the transmission of these documents to the parties in order to grant them the faculty to exercise their right of defence. Nor is there a copy of any other letter sent to the parties after the publication of the acts, or at least an annotation about any information given to the parties by the tribunal. Therefore, the right of defence does not consist in following the procedural regularities alone; rather it consists in granting the parties in a true sense the concrete possibility to know and contradict during the trial.

Moreover, when these decrees are examined in depth, other irregularities have also been found. The decree of publication of the acts has limited the faculty to inspect the acts only to the advocates of the parties and not to the parties themselves. The Rotal judge considers this as a violation of the prescript of the norm of can. 1598 §1, which necessitates the publication of the acts to the parties and to their advocates. Moreover, in this case, the respondent had no advocate or procurator in the process.

The Rotal judge continues to argue that the real concern is not whether the publication of the acts had been carried out rightly or not, but whether there is a notification of the publication of the acts to the respondent. In the acts, there is no evidence of notification of the decree of the publication of the acts and therefore, the affirmation of the respondent gains greater strength. In addition, there is also no evidence regarding the fact of notification of the decree of the conclusion of the case.

At the examination of all the acts of the first grade, there are ample proofs regarding the notification of the decrees. For example, in the copy of the letter, by which the respondent has been intimated and notified of the introduction of the case by the petitioner, there is at the bottom a short note about the transmission with a note of reception (registered with return card). There is also a copy of the letter sent to the respondent regarding the admission of the *libellus* and a copy of the invitation to the respondent for the investigation. It is, therefore, certain that the tribunal of the first grade at the initial phase of the process has acted in accordance

with the procedural norms concerning the importance of the acts to be notified in order to respect the right of the respondent. Therefore, it is unjust to argue that the subsequent failure to notify and communicate the acts is to be attributed to a particular consistent behaviour of the tribunal. One could obviously conclude that the respondent is excluded from the trial of the first instance, especially from the publication of the acts. Consequently, the sentence of the tribunal of the first instance is totally null on the ground of can. 1620, 7° (*DC* art. 270, 7°) because of the denial of the right of defence. This confirmatory decree is also null for the motive of reason of the derived nullity.

Besides, there are other procedural irregularities which affect the possibility of the right of defence of the parties. In the decree of the publication of the sentence, there is only the dispositive parts of the sentence attached. There is a mention that the sentence was at the chancery of the tribunal which is totally against the prescript of the norm of can. 1615. It prescribes that the intimation of the sentence is made by giving or sending a copy of the sentence. All the more, the information regarding the appeal is also incomplete. There is no mention regarding the appeal before the Roman Rota as it has mentioned the possibility of the appeal only before the local tribunal of appeal. The decree also has limited the period of time for appeal to ten days, whereas can. 1630 §1 provides a longer period of fifteen days. Therefore, the Rotal judge proposes that the case be remitted again to the tribunal of the first instance so that the process is correctly pursued. The Rotal judge also affirms that there is a proof of nullity of the sentence of the tribunal for the first instance and of the confirmatory decree of the appeal tribunal.

2.2 *Coram* Turnaturi, 14 December 2009[28]

The man petitioner, having ended his marital life 23 years after the

[28] Cf. *Coram* Turnaturi, 14 December 2009 (USA), B. Bis 167/09; cf. A. Mendonça, "Recent Rotal Jurisprudence on Procedural Irregularities Amounting to Nullity of Decision – I", in *Studies in Church Law* 7 (2011), 183-240.

marriage, presented a *libellus* in the tribunal of the first instance, accusing his marriage of nullity on the ground of exclusion of the good of the spouses on the part of the woman respondent. The tribunal of the first instance issued an affirmative sentence on the alleged ground. After receiving the observations of the defender of the bond, the appeal tribunal neither issued the decree to confirm the affirmative sentence of the tribunal of the first instance nor submitted the case to an ordinary examination. But it decreed the concordance of the doubt under the following formula: "whether the definitive sentence rendered by the tribunal of the first instance is to be ratified or revised, either totally or partially." The parties did not participate in this phase of the trial. The appeal tribunal gave a negative decision and overturned the affirmative sentence of the tribunal of the first instance. The petitioner appealed against the decision of the appeal tribunal to the Rota. The defender of the bond at the Rota proposed a plaint of nullity against the decision of the tribunal of the second instance on the ground of violation of the right of defence.

Turnaturi cites can. 221 §1 to say that the right of defence is rooted in the natural law principle in virtue of which the faithful have the right to vindicate and defend their rights in the competent ecclesiastical forum in accordance with the law. He also quotes the principle given by John Paul II in his allocution to the Roman Rota on 26 January 1989 where the principle of *contradictorium* is considered as the vital element of the right of defence. The function of the positive law is not to deprive one of the exercise of the right of defence, but to regulate it so that it does not degenerate into abuse and to ensure the practical concrete possibility of exercising it in the forum.

Turnaturi opines that the established Rotal jurisprudence on the right of defence is that it consists primarily and essentially not in its effective exercise but the possibility and opportunities afforded and granted to both the parties for exercising it during the process, beginning from the joinder of issue till the definitive sentence. Therefore, he continues to observe:

> The right of defence consists not in its effective exercise but in the possibility permitted and granted to the both parties to exercise it during the process from the *litis contestatione* until the definitive sentence and violation of the right of defence is verified not due to the omission of the exercise of the right of defence but the owing to the denial of the possibility of truly exercising it during the trial until the definitive sentence.[29]

The Rotal judge, Turnaturi, cites the decree of Davino, who says:

> The right of defence, if the words have their own meaning, says nothing other than the possibility of self-defence. But when there is a discussion within the context of the process of nullity of marriage about this right, the right of defence demands that each party has the possibility of contradicting the demand or observations of the other party. This possibility however necessarily demands first of all to have the notification of the object of the controversy, to know the proofs brought forward by the opposing party and to propose one's own. Then to present his/her own arguments over the proofs and to know the contrary arguments. And finally to respond to such arguments. There are still other elements which can render easier this faculty of defending self, but these, unless they are stated under the pain of nullity, do not carry the nullity neither of the act nor of the sentence.[30]

Both in doctrine and jurisprudence, the right of defence is regarded as a constitutive of the canonical trial. This is to be protected from the very beginning of the joinder of the issue wherein begins the procedural relationship between the parties. Therefore, in the light of these principles, Rotal judge, Turnaturi, prescribes that the citation of the respondent party

[29] *Coram* Turnaturi, 14 December 2009, 229, n. 7: "[...] ius defensionis consistere non in effectivo eiusdem exercitio sed in possibilitate utrique parti permissa et concessa illud exercendi volvente processu a litis contestatione ad sententiam definitivam et ultra pariterque eiusdem violationem vierficari non ob defectum vel omissionem exercitii sed ob denegatam possibilitatem illud rite exercendi perdurante iudicio contentioso usque ad sententiam definitivam."

[30] *Coram* Davino, 15 January 1990, *RRDecr.*, Vol. 8 (1990), 3-4, n. 7: "Ius defensionis, si verba suam habent significationem, nihil aliud dicit nisi possibilitatem sese defendendi. Cum vero in processu nullitatis matrimonii de hoc iure sermo fiat ius defensionis postulat ut unaquaeque pars possibilitatem habeat contradicendi alterius postulationi vel animadversionibus. Haec autem possibilitas necessario exigit praeprimis notitiam habere de litis obiecto, dein cognoscere allatas probationes ex adverso ac proprias proponere. Super probationes dein suas facere argumentationes ac adversas didicere. Ac denique argumentationibus huiusmodi responsionem praebere. Alia adhuc habentur, quae hanc facultatem sese defendendi faciliorem reddere possunt quaeque tamen, nisi sub nullitatis sanctione statuta sint, nullitatem nec actus nec sententiae secumferunt."

(cf. can. 1508), concordance of the doubts (cf. can. 1513), interrogation of the parties, proof through witnesses (cf. can. 1547), proofs through experts (cf. can. 1574), proofs through instruments (cf. can. 1539), publication of the process and discussion of the cause (cf. cann. 1598-1606) are essential for the protection of the right of defence in the procedure. He concludes, "any denial of these procedural formalities will amount to denial of the right of defence."[31]

Turnaturi argues that the second instance tribunal has no evidence in the acts that the citation decided by the decree of the college on 10 April 2007 or the concordance of the doubt carried out by the judge on 12 April 2007 had been notified to the parties in accordance with the norm of the law. The Rotal judge states:

> It does not suffice that the judge, in order to vindicate the right of defence, makes an order to cite the parties or carries out the joinder of the issue; rather he needs to ensure that the decrees are notified according to the norms of the law to the parties who have an interest in the cause with respect to all their legal effects.[32]

The Rotal judge argues that in the acts of the cause there is no proof of proper citation or the concordance of the doubt. He observes that the tribunal of the second instance has failed to carry out two essential procedural elements which amount to the denial of the right of defence. He remarks, "their right to participate in the trial was substantially constrained and there was a denial of the faculty to properly exercise the *contradictorium*"[33] which results in the violation of the right of defence

[31] *Coram* Turnaturi, 14 December 2009, 230, n. 9: "Quae si omissa sint certo certius denegatur alterutri parti ius defensionis."

[32] *Ibid.*, 231, n. 11: "Ad vindicandam ius defensionis non sufficit Iudicis iussum citandi partes vel dubii concordatio a Iudice perfecta, sed oportet decreta eiusmodi ad normam iuris notificentur omnibus quorum interest ad omnes iuris effectus."

[33] *Ibid.*, 232, n. 14; "[…] partium ius in iudicio partecipandi substantialiter coarctatum fuisse contradictoriumque excercendi eisdem denegatum fuisse." cf. *Coram* Alwan, 17 February 2009, B.Bis 27/2009, n. 5 (Unpublished): "Non omnes actus processuales sunt essentiales ad iuri defensionis praecavendum, iurisprudentia enim distinguit inter actus accidentales et substantiales, seu qui defensionis substantiam pertingunt"; *Coram* Salvatori, 19 February 2015, B.Bis 20/2015, n. 5 (Unpublished); Id., 11 January 2017, B.Bis 2/2017, 3, n. 4 (Unpublished).

as the advocate of the petitioner correctly pointed out that parties were not heard and there was no *contradictorium* in the tribunal of the second instance. The judge also clarified that these violations of the procedural regularities of the parties constitute *non-existence* of the process.[34]

2.3 *Coram* De Angelis, 26 May 2010[35]

In this case, the man petitioned in the first instance tribunal for the declaration of the nullity of marriage on the ground of defect of discretion of judgement on the part of both the parties. The tribunal cited the woman three times to respond. The respondent having failed to respond to the three citations was declared absent from the trial. The decision pronounced by the tribunal was negative on both the grounds. The petitioner did not appeal. The appeal tribunal also confirmed the negative sentence after receiving the observations of the defender of the bond when it was forwarded *ex officio* for confirmation. The petitioner interposed recourse before the Roman Rota. The Rota admitted the case on the ground of the plaint of nullity against the decision of the appeal tribunal.

Rotal judge, De Angelis, argues that the sentence of the first grade had not been properly published, and thus the subsequent decision suffers from nullity.[36] Quoting the sentence of Funghini,[37] he substantiates his argument that at the appeal grade the parties are not able to exercise their right unless they are informed of the motives for making the decision or of the transmission of the acts *ex officio* (cf. can. 1682) to the tribunal of appeal.

The judge argues that the first instance tribunal *ex officio* transmitted the negative sentence and the acts of the cause to the appeal tribunal without

[34] Cf. *Ibid.*: "Nam partes […] auditae non sunt et nullum contradictorium initum est; immo, attento quad nullum contradictorium in altero iurisdictionis gradu evenit, plus quam de nullitate sententiae appellationis heic agitur de *inexisentia* processus."

[35] Cf. *Coram* De Angelis, 26 May 2010, B. Bis 73/2010; Cf. A. Mendonça, "Recent Rotal Jurisprudence on Procedural Irregularities Amounting to Nullity of Decision – I", 183-240.

[36] Cf. *Ibid.*, 186, n. 4: "Animadvertunt in primis Patres quod in casu sententia primi gradus rite publicata non est. Omissa publicatione sententiae, nullitate laborant subsequentes decisiones."

[37] Cf. *Coram* Funghini, 29 November 1990, *RRDec.*, Vol. 82 (1990), 823-833.

an appeal by the aggrieved petitioner. In this way, the first instance tribunal led the appeal court into error. The acts of the cause are meant to be sent *ex officio* to the appeal tribunal only after an affirmative decision (cf. can. 1682). Therefore, the Rotal *turnus* considered the second instance decree null on the ground of violation of the petitioner's right of defence due to the absence of judicial petition (cf. can. 1620, 4°; *DC* art. 270, 4°) as the adage goes, "there is no judge without a petitioner."[38] A negative sentence cannot be confirmed by decree because in this case the right of defence is denied to the petitioner as he is judged without a petition. Therefore, the decree of the appeal tribunal was declared irremediably null and the cause was remanded to the appeal which shall proceed according to the norm of law by intimating both the parties the sentence of the first grade so that the petitioner, if he wishes, may use his right of appeal.

2.4 *Coram* Arokiaraj, 28 May 2010[39]

The man petitioned in the first instance tribunal after the break-up of family life, accusing his marriage of nullity. It was done with a view to recover his free status in the canonical forum and to have a second marriage in the Church. The reasons, which he prescribed for claim of nullity of his marriage, had no judicial relevance and significance and thereby contained no ground according to the norms of Canon law. The tribunal consisting of a single judge was constituted who determined the following grounds of nullity for the case: 1) defect of discretion of judgement on the part of the man petitioner according to can. 1095, 2° and relative incapacity on the part of both according to the norm of can. 1095, 3°. The first instance decision was affirmative on the ground of defect of discretion of judgement. The ground of relative incapacity was completely ignored.

The defendant appealed to the tribunal of the second instance against this affirmative decision. The appeal tribunal admitted the case

[38] *Coram* De Angelis, 26 May 2010, 189, n. 5: "Tribunal appellationis [...] iudicium igitur fecit nullitate laborans ob defectum petitionis iudicialis, iuxta adagium 'nemo iudex sine actore'."

[39] Cf. *Coram* Arokiaraj, 28 May 2010, in *Studies in Church Law* 6 (2010), 389-396.

to an ordinary examination of the second grade and after completing the supplementary instruction overturned the preceding affirmative sentence and on 14 May 2008 issued that there was no proof of nullity of marriage in the case on the ground of defect of discretion of judgement in the petitioner. The second instance tribunal, however, had omitted both the publication of the acts and conclusion of the case. The petitioner appealed to Roman Rota against this decision where the advocate of the petitioner lodged a plaint of irremediable nullity by way of exception against the sentence of the second instance tribunal on the ground of denial of the right of defence to her client in accordance with the norm of can. 1620, 7° (*DC* art. 270, 7°) due to the lack of the publication of the acts according to can. 1598 §1 (*DC* art. 229). Now Rotal judge, Arokiaraj, intends to resolve the question whether there is any proof of nullity of the sentence pronounced on 14 May 2008 by the tribunal of the second instance.

Rotal judge, Arokiaraj, enumerates various juridic principles applicable to this case. First of all, he says that the violation of right of defence enshrined in can. 1620, 7° (*DC* art. 270, 7°) occurs when the parties are not able to defend themselves through the exercise of the *contradictorium* which in formal sense assumes its principle from the joinder of issue (cf. can. 1513), by which the object of the controversy is legitimately defined.[40]

Secondly, the right of defence implies that the parties are able to inspect all the acts not yet known to them before the pronouncement of the definitive decision so that they may prepare their self-defence. Therefore, if the proofs, which are adduced by one party, are unknown to the other party, there is no possibility of contradicting them and defending their rights. Can. 1598 §1 (*DC* art. 231) prescribes under the pain of nullity the publication of the acts which are not yet known to the parties. The failure

[40] Cf. *Ibid.*, 391, n. 5: "Postulat vero ius defensionis ut partes per exercitium contradictorii sese defendere valeant. Contradictorium sub respectu formali principium capit ex litis contestatione (cf. can. 1513), qua litis obiectum in suis elementis legitime definitur, et perficitur facultate adducendi probationes utrique parti concessa et servata."

to issue or to intimate the decree of publication of the acts to the parties and the sentence pronounced subsequently would suffer from irremediable nullity due to the denial of the right of defence.[41]

Thirdly, it is not necessary that the parties must exercise the defence for the validity of the acts. Rather it is enough that the concrete possibility of exercising the defence remains intact.[42]

Fourthly, the Rotal judge quotes the Rotal jurisprudence of Giannecchini who prescribes that the right of defence begins from the publication of the acts, i.e., "that is after knowing the arguments of the party, the other party can prepare to contradict according to the norms of cann. 1598, 1599, 1600, 1601."[43] Rotal judge, Burke, also upholds this and prescribes in his sentence:

> after both the parties have made a substantial presentation of his/her thesis, the right of defence demands that each party is informed of the arguments adduced by the other party so that they may see whether they can refute certain indications or arguments through examination or complete the acts by introducing new witnesses and even by presenting new documents.[44]

[41] Cf. *Ibid.*: "Exigit insuper ius defensionis ut partes acta Omnia ante causae definitionem inspicere possibt ad propriam defensionem apte apparandam. Etenim si probationes ab altera parte adductae igorantur, deficit ipsa possibilitas illis contradicendi et proprium ius defendendi. Unde can. 1598 sequentibus verbis publicationem actorum sub poena nullitatis praecipit: 'Acquisitis probationibus, iudex decreto partibus et earum advocatis permittere debet sup poena nullitatis, ut acta nondum eis nota apud tribunalis cancelleriam inspiciant'." Two decrees cited by Rotal judge Arokiaraj may be noted in reference to this principle: *Coram* Stankiewicz, 28 July 1994, *RRDecr.*, Vol. 12 (1994), 174, n. 12; *Coram* DeFilippi, 25 July 1997, *RRDecr.*, Vol. 15 (1997), 174, n. 5: "Quoniam ius inspiciendi omnes probationes quae collectae sunt tempore instructionis causae, 'intime conectitur cum iure defensionis' (*Communicationes* 15 (1984), 68), communis iurisprudentia commemoratam sanctionem nullitatis ob denegatam possibilitatem invisendi acta 'cum insanabili nullitate sententiae identificat proprie ob ius defensionis alterutri vel utrique parti denegatum (can. 1620, 7°)', ideoque eam contendit verificari 'si et quatenus ius defensionis de facto denegatum fuerit' (*Coram* Stankiewicz, 28 July 1994, 174, n. 12)."

[42] Cf. *Coram* Arokiaraj, 28 May 2010, n. 5: "Sane in nostra lege canonical non requiritur ad validitatem actuum ut defensio sit reapse exercitata, cum huiusmodi exercitio partes possint voluntarie abdicare: necesse tame nest ut facultas seu concreta possibilitas defensionem exercendi semper inconcussa maneat."

[43] *Coram* Giannecchini, 24 March 1994, *RRDecr.*, Vol. 12 (1994), 45, n. 8: "Tunc, cognitis argumentationibus alterius partis, unusquisque ad contradicendum properare potest ad normam cann. 1598, 1599, 1600, 1601."

[44] *Coram* Burke, 16 November 1989, *RRDec.*, Vol. 81 (1989), 684, n. 5: "postquam utraque pars

Finally, Rotal judge, Arokiaraj, quotes the sentence of the Rotal judge, Stankiewicz who gives complete explanation of the consequences of the non-publication of the acts. He observes:

> the sanction of nullity due to denial of the faculty to inspect the acts of the case affect not only the decision itself from which the defect of remediable nullity of the sentence can arise (cf. can. 1622, 5°), but also cause the denial of the right of defence, if it concerns the acts that are completely unknown.

Thus, it can bring about the defect of irremediable nullity also of the sentence (cf. can. 1620, 7°; *DC* art. 270, 7°). This is because the communication of proofs provides for legitimate defence pertaining to the substance of the trial.[45]

Rotal judge, Arokiaraj, argues that the appeal tribunal failed to issue the decree of publication of the acts. This is of great procedural importance as it concerns the right of defence of the parties. The advocate of the petitioner stated that the petitioner was not able to inspect the acts before the sentence of the second instance issued, but only at the occasion of lodging the appeal to the Roman Rota. When the judge of the second instance tribunal was asked by the Rotal judge to send a copy of the decree of publication of the acts, the judge of the second instance wrote, candidly admitting, "going through the files and papers of the case, I do not find any copy of the decree of the publication of the acts of the second instance."[46] He further stated that there was no new evidence in the second instance, except for the repetition of what had already been stated before the first

thesim suam substantialiter praesentaverit, ius defensionis requirit ut unaquaeque certior fiat de argumentis ab altera parte allatis; possibilitas scilicet realis ad acta perscrutanda partibus praebenda est, ita ut, allegationibus perpensis, videant utrum quaedam indicia vel argumenta per iteratam testium excussionem infirmare valeant, vel acta, novis testibus inductis, documentis etiam novis exhibitis, complere queant."

[45] Cf. *Coram* Stankiewicz, 29 March 1996, 71, n. 12: "haec [...] sanctio nullitatis ob denegatum alterutri saltem parti facultatem inspiciendi acta causae non solum *ipsum iudicium* afficit, ex quo vitium nullitatis sanabilis sententiae derivari potest (cf. can. 1622, 5°), sed etiam denegatum ius defensionis plectit, si agatur de actis omnino ignotis, et ita ad vitium nullitatis insanabilis quoque sententiae conferre valet (cf. can. 1620, 7°), cum probationum communicatio legitimae defensioni ad substantiam iudicii pertinenti caveat"; Id., 26 October 1990, 161, n. 14.

[46] *Coram* Arokiaraj, 28 May 2010, 395, n. 8.

instance tribunal and therefore, he skipped the formalities of publication of the acts in the second instance and issued the sentence. However, there were, in fact, several new documents which constitute new evidence and therefore obviously the petitioner had the right to inspect them.

It is e evident from what has been discussed that the norm of can. 1598 §1 was violated by the tribunal of the second instance and consequently the right of the petitioner to efficaciously and integrally defend himself was denied in the same instance. Therefore, the judge affirms to the incidental question stating that there is proof of nullity of the sentence issued by the tribunal of the second instance due to the denial of the right of defence of the parties arising from the absence of the publication of the acts.

2.5 *Coram* Monier, 28 May 2010[47]

The man petitioned in the first instance tribunal for the declaration of nullity of his marriage. The cause was declared abated because of the silence on the part of the petitioner. Again, on 10 January 2006 the case was resumed. After some correspondence between the tribunal and the parties, the judge of the tribunal on 4 October 2006 issued many decrees on the declaration of the competence of the tribunal, constitution of the court with sole judge, admission of the *libellus*, absence of the respondent, concordance of the doubt and the publication of the acts. The defender of the bond submitted his observations on the same day as well. The judge, after an exchange of the letters between the parties and tribunal, issued the decree of the conclusion on 18 October 2006 and then appointed *ex officio* advocate for the woman respondent on 25 October 2006. Having heard the witnesses through questionnaires and after the petitioner indicated that he had inspected the acts, an affirmative sentence was given on 7 March 2008 on the ground of defect of discretion of judgement on the part of both the parties. The woman respondent interposed an appeal to the Roman Rota together with a plaint of nullity on the following grounds:

[47] Cf. *Coram* Monier, 28 May 2010, B. Bis 82/2010; Cf. A. Mendonça, "Recent Rotal Jurisprudence on Procedural Irregularities Amounting to Nullity of Decision – I", 183-240.

the lack of petition to initiate the case; the incompetence of the tribunal; the presence of the procurator who purportedly acted in the name of the respondent without a legitimate mandate and without the knowledge of the respondent; and the denial of the right of defence.

The judge argues that the constitution of advocate *ex officio* does not require the party's mandate, because the designation by the judge or the judicial vicar is sufficient and there is a proof for such a designation of the advocate in the acts.[48] However, the judge goes further to point out that the problem was not with the *ex officio* designation of the advocate but with the time of the appointment of the advocate and how the advocate was utilized by the judge. According to the acts, the advocate was appointed *ex officio* on 25 October 2006, twenty-one days after the publication of the acts and the declaration of the respondent's absence from trial and seven days after the conclusion of the case. Moreover, the acts make it clear that the appointment of the advocate was not communicated to the respondent and the advocate did nothing after his appointment to protect the rights of the respondent. The judge, moreover, did not notify any acts to the advocate. Therefore, the judge concludes that there is a grave violation of the right of defence of the respondent in the first instance tribunal, and thus sentence is irremediably null.[49]

The respondent has referred to the denial of the right of defence according to can. 1620, 7° (*DC* art. 270, 7°) as the fourth reason for the plaint of nullity of the sentence of the first instance tribunal. The Rotal judge, Monier, quoting the decree of Stankiewicz, explains that the right of defence consists of two elements: 1) the right to information; and 2) the right to hearing. The right to information signifies the necessity of informing the parties of the facts, proofs and the decision. The right to be informed is a passive right as the parties do not have to necessarily act on

[48] Cf. *Ibid.*, 192, n. 4: "Constitutio Patroni ex officio haud requirit mandatum procuratorium, cum sufficit enim designatio ex parte Vicarii iudicialis, quae in casu adest."

[49] Cf. *Ibid.*

them, if they are not interested. The right to hearing means that the faculty of the parties to speak and contradict the facts, proofs and decisions and to introduce proofs and present defence. These are intimately linked. This right to hearing pertains only to the possibility of exercising such a right, but not for its effective exercise.[50] The judge continues to argue that the above elements constitute the *contradictorium*, which is the constitutive element of judicial process. Without *contradictorium* there cannot exist a just trial. Therefore, a right cannot be considered a true right, if there is no concrete possibility of exercising it.

The first instance tribunal issued the following decrees on the same day (on 4 October 2006): 1) a decree stating the tribunal's competence; 2) a decree constituting the sole judge tribunal; 3) a decree admitting the *libellus*; 4) a decree declaring the absence of the respondent; 5) a decree of the formulation the doubt; and finally 6) a decree of publication of the acts. The defender of the bond submitted the observations on the same day. Therefore, the judge is of the opinion that the first instance tribunal proceeded without paying proper attention to the procedural regularities of the legal process and after the conclusion of the case, the judge collected the proofs and immediately issued an affirmative sentence.

The Rotal judge observes that there is a failure to publish the acts to the parties in accordance with the norm of can. 1598 §1 (cf. *DC* art. 229 §2) and this amounts to the denial of the right of defence. According to can. 1620, 7° (*DC* art. 270, 7°), the sentence suffers from the irremediable nullity of the sentence when the right of defence is denied to one or both parties. The right of defence and the publication of the acts always go

[50] Cf. *Ibid.*, 193, n. 5; *Coram* Stankiewicz, 27 May 1994, 120, n. 10: "Ius defensionis autem in semetipso consideratum duobus constat elementis, scilicet: a) 'iure ad informationem', quod consistit in necessitate praemonendi partes ope notificationum circa facta, probationes et decisiones; b) 'et iure ad auditionem' quod consistit in possibilitate partibus concedenda tum dicendi et contradicendi circa facta, probationes decisionesque, tum inducendi probationes exhibendique defensiones [...]. Haec duo elementa inter se intime coniunguntur, quorum prius seu 'ius ad informationem' indolem passivam habet, quia nullam partium activitatem requirit praeter animi dispositionem ad receipiendas notificationes, dum alterum seu 'ius ad auditionem' pertinet tantum possibilitas exercendi ius huiuscemodi, minime vero effectivum ius exercitium."

hand in hand and the failure of which results in irremediable nullity of the sentence.[51] Hence, the Rotal judge concluded that the parties were not given the concrete possibility of self-defence and for this reason, the Rotal judge declared the decision of the first instance irremediably null.

2.6 *Coram* Yaacoub, 24 October 2012[52]

The canonical marriage took place in 1982. In 1987, the woman obtained a civil divorce. In the same year, she presented a *libellus* in first instance tribunal seeking a declaration of nullity of her marriage due to defect of discretion of judgement concerning the essential matrimonial rights and duties to be mutually given and accepted on the part of both the parties as per can. 1095, 2°. The doubt was determined according to the formula, whether there is proof of nullity of marriage in the case due to the defect of discretion of judgement concerning the essential matrimonial rights and duties to be mutually given and accepted on the part of both parties according to the norm of can. 1095, 2°. The trial continued and the tribunal pronounced a negative sentence, declaring that there is no proof of nullity of marriage in the case on the said ground. The woman petitioner lodged an appeal together with the plaint of nullity before the Roman Rota against the first instance stating that she was not able to inspect the observations of the defender of the bond, nor did she respond to them and nor did she get a copy of the sentence. She argued that the sentence was given to her only after the second request.

The judge argues *in iure* part that the right of defence occurs when the judge explicitly or implicitly denies or prevents the parties the faculty to exercise their right of defence. Thus, the nullity of sentence does not arise when the party due to negligence or renunciation fails to exercise his/her

[51] Cf. *Coram* Giannecchini, 28 January 1993, *RRDecr.*, Vol. 11 (1993), 12, n. 3: "Publicatio actorum et ius defensionis pari gressu procedunt etiam in consequentiis usque ad nullitatem insanabilem sententiae."

[52] Cf. *Coram* Yaacoub, 24 October 2012, in *Studia Canonica* 50 (2016), 575-580.

right to defend himself/herself.[53] The right of defence is exercised through *contradictorium* which begins in a formal sense from the joinder of the issue. It is by the joinder of the issue that the object of the contention is defined. The right of defence also demands that the parties have the faculty to inspect all the acts in order to prepare a proper defence. If, in fact, the proofs of the other party are unknown, the other party cannot defend himself/herself. The judge argues that the right to information and the right to hearing were safeguarded because the woman petitioner had been informed of the various phases of the trial, the decrees constituting the tribunal, the degree of concordance of the doubt, the decree of admission of proofs, the decree of publication of acts and the decree of conclusion of the acts. She was heard twice and was able to inspect the acts and to present her observations. The judge responded to the proposed question of the woman petitioner negatively, since there was no violation of right of defence.

2.7 *Coram* Erlebach, 9 April 2013[54]

The question proposed to the Rota was whether or not the Rotal decree *Coram* Yaacoub issued on 24 October 2012 (the preceding case) should be confirmed, that is, whether there is proof of nullity of the sentence pronounced in the first grade of trial in the cause mentioned above. Therefore, in the preceding case, the object of the controversy was the plaint of nullity of the sentence of the tribunal of the first instance due to the denial to the parties the faculty of inspecting the observations of the defender of the bond and to responding to them during the first instance trial.

In the *in iure* part, the Rotal judge indicates the prescript of can. 1603 which obliges the judge to facilitate the exchange of defence between the

[53] Cf. *Ibid.*: 577, n. 6: "Denegatio iuris defensionis habetur si Iudex explicite vel implicite parti exercitium huiusmodi iuris denegat vel praepedit, non si ipsa pars ex neglegentia vel renuntiatione, hoc ius non exercet."

[54] Cf. *Coram* Erlebach, 9 April 2013, in *Studia Canonica* 50 (2016), 581-588.

parties and the defender of the bond so that the private and public parties might be able to present their responses. He adds that this would be a means for exercising the right of defence through *contradictorium*. Therefore, the exchange of defence is a provision for the further defence foreseen by law and consequently, the lack of the above-mentioned exchange can be seen under the light of the denial of the right of defence. Moreover, can. 1620, 7° (*DC* art. 270, 7°) indicates the nullity of the sentence if the right of defence is denied. But he adds, quoting the sentence of Brennan, that the nullity of sentence does not result in the case of any violation of the right of defence, but only in the case of total or partial denial which deprives the party of the essence of trial, i.e., *contradictorium*[55] which is an essential dimension of the right of defence. He cites the sentence of Stankiewicz according to which substantial violation takes place when the party is neither able to contradict the action of the adverse party owing to the behaviours of the tribunal personnel, nor has the faculty to challenge the proofs gathered during the instruction of the case, to make judicial declaration or to present arguments in regard to the controversy for which the trial has been instituted.[56] Erlebach, quoting Colagiovanni,[57] observes that presentation of proofs and arguments pertains to the essence of the right of defence and the discussional phase of the process is also of the essence of a contentious trial since in the discussional phase there is the presentation of arguments.

However, according to Erlebach not every faculty which belongs to the parties in the discussional phase has the same value. He argues that the faculty to contradict the proofs presented by the other party, i.e., the faculty

[55] Cf. *Ibid.*, 584, n. 4: "Nullitas sententiae non scatet in casu cuiuslibet violationis iuris defensionis, sed solummodo in casu denegationis totalis vel etiam partialis, si "essentia ipsa iudicii deficiat"; *Coram* Brennan, 27 November 1958, *RRDec.*, Vol. 50 (1958), 661, n. 3.

[56] Cf. *Coram* Stankiewicz, 22 November 1984, in *Monitor Ecclesiasticus* 113 (1988), 322, n. 5: "Substantiali iure defensionis is certo spoliatus habetur, qui nec actioni a parte adversa in iudicium deductae contradicere valuit ob agendi rationem ipsius Tribunalis, nec probationes tempore instructionis collectas impugnare, nec propriam declarationem iudicialem facere, nec argumenta exhibere quoad factum circa quod iudicium versabatur."

[57] Cf. *Coram* Colagiovanni, 21 May 1985, 121, n. 8.

to present the first defence, that is, the written brief of law and of fact (by the party or rather by his or her advocate) and the observations on the part of the defender of the bond pertains to the crux of the discussional phase, whereas "the second defence, i.e., written brief of response or responses on the part of the defender of the bond pertains only to the integrity of the discussional phase."[58] This is in conformity with this principle defined in an interlocutory sentence *coram* Pinto (13 January 1984) who puts forth this aspect very clearly: "it does not seem that the sentence is invalid when the violation of the right of defence is limited to the defect of communication of the observations of the defender of the bond."[59]

Based on this principle and argument, Erlebach declares that the sentence is not invalid due to the violation of the right of defence; rather it is limited by the failure in communicating the observations of the defender of the bond. He considers this as only an accidental violation and not as a substantial violation of the right of defence. Therefore, the sentence of the tribunal of the first instance is valid as there is no substantial violation of the right of defence of the parties.

2.8 *Coram* Arokiaraj, 13 December 2017[60]

In this case, the man petitioned in the first instance tribunal for the declaration of the nullity of marriage after twenty-year period of living together and after having four children. The petition for the nullity of the marriage was based on the ground of defect of discretion of judgment on the part of both and the incapacity of the woman respondent to assume the essential obligations of the marriage. The plaintiff gave a mandate to an advocate who performed the work of an advocate and procurator. The woman defendant was cited and she received from the tribunal a pre-

[58] *Coram* Erlebach, 9 April 2013, 585, n. 4: "secunda defensio, seu Restrictus responsionis ve Responsiones ex parte vinculi Defensoris, pertinet solummodo ad integritatem phasis discussoriae"

[59] *Coram* Pinto, 13 January 1984, in *Monitor Ecclesiasticus* 110 (1985), 287, n. 8: "non videtur invalidam esse sententiam cum iuris defensionis violatio limitatur ad defectum communicationis animadversionum defensoris vinculi."

[60] Cf. *Coram* Arokiaraj, 13 December 2017, B. Bis. 133/2017 (Unpublished).

written form of the "mandate of procurator" which she signed, nominating a procurator for her. The instruction of the phase was conducted, hearing the party, witnesses and an expert. The acts were published not to the parties but only to the advocates and the procurator. The expert had also advised the judge not to transmit or read the acts to the parties on whom the expert conducted the study. The advocates of the actor and procurator of the defendant after having seen the acts, gave their consent for the conclusion of the cause. The advocate acted for the plaintiff. The defender of the bond was only for the sake of name and, in reality, betraying his office, acted in favour of the nullity. No technical defence was carried out for the defendant. The first instance judgement was issued on 6 June 2016 and the sentence was affirmative declaring the nullity of the marriage on the ground of lack of discretion of judgement of both the parties. The defendant made an appeal in the Roman Rota against the sentence of the first instance. The Roman Rota established a college of judges to resolve the preliminary question of the appeal (cf. can. 1680 §2). After hearing the observations of the defender of the bond and promoter of justice, the judge established that the question of the nullity of the sentence of the first instance should be raised or to be resolved. The study raises a more important question: whether the right of defence of the respondent, which supports the validity of the marriage, was essentially respected or not.

In the *in iure* and *in fatto* part, the college of judges, after having examined the acts and the observations of the parties accurately and carefully, considers that in the first instance, the right of defence of the respondent and even of the marriage bond was substantially injured. According to the acts of the case, the respondent had a procurator. The procurator received the decree of the publication of the acts. He did not make any defence for the respondent during the discussional phase. He received the notification of the sentence, of which he notified only some elements to the respondent. Some Rotal decisions[61] in the past have

[61] Cf. *Coram* Funghini, 11 May 1994, *RRDecr.*, vol. 12 (1994), 95, n. 7; *Coram* Ferreira Pena, 29 May 2009, B. 77/2009, n. 6.

considered that the publication of the acts to the procurator alone is enough to guarantee the right of defence of the parties. Rotal judge, Arokiaraj, states that it is not sufficient to avoid the essential injury of the right of defence. According to Rotal judge, Arokiaraj, in this case, publication of the acts to the procurator alone would not guarantee the right of defence of the respondent. He argues that the procurator has no idea of the facts, which the party knows and would have experienced in life. The party in question alone, who knows deeply the essential events of the life, after reading the acts can oppose the false assertions of the other plaintiff, complete the proof in discussional phase and propose new arguments. Therefore, the publication which is made only to the procurator pays attention to the right of defence more in a formal way than in a substantial way.[62] Only from a merely formal point of view would it have been sufficient to notify the procurator of the party of the acts. This would not suffice to remedy the denial of the right of defence, which nevertheless occurs because the party, especially the defendant who resists, has not been given the right to see all the acts and to contradict before a decision was made by the judge.[63]

He argues that the faculty is necessarily to be given to the respondent herself in order to enable her to use this faculty so that she can examine the acts and contradict the claims of the plaintiff. The ability to contradict belongs to the essence of the judicial process and if this faculty is negated or removed, the sentence of the process is necessarily null.[64]

Rotal judge, Arokiaraj, quoting the sentence *coram* Rotal judge, McKay, argues:

> Publication made only to the procurators should not suppress or remove the whole right of the party to examine the acts and the same party, if he/she wants, can always exercise this right in person. Therefore, it is to be rejected and deplored that the habit of some court officials who ask the party to appoint an advocate or procurator at the beginning of the trial, without giving the same party explanations on the meaning of their appointments, fraudly claim to respect the rights of the party under the pretext of the appointed advocate or procurator. In this way, they deny the parties the right to inspect the acts or do not inform the party about the publication of the acts and their right to see the acts.[65]

In this case, the respondent has lodged her critical observation in the preliminary phase through the procurator. But during the discussional phase the same respondent did not defend herself by believing that she would be defended by the appointed procurator. However, the procurator was silent. Therefore, this is an essential infringement of the right of defence.

The first instance organized the things only for the plaintiff and the plaintiff alone has benefitted from the aid of the advocate. It denied the provision for the advocate to the respondent who especially requested it. Therefore, the judge denied equality between the parties. Denial for the provision for the respondent to have an advocate constitutes denial of the judge of the right of defence of the respondent. The first instance tribunal has given the respondent women only the possibility of nominating the procurator who has never presented anything in defence of the respondent. Therefore, the right of defence of the respondent to have technical aid and to defend herself is denied.[66]

[62] Cf. *Coram* Arokiaraj, 13 December 2017, 3, n. 5: "Sola pars vices exsistentiales funditus rescit ideoque valet, perlectis tabulis (ac dein decisione) falsis assertionibus refragari, partiales complere, nova argumenta haud emersa proponere. Publicatio ergo procuratori tantum facta magis formaliter quam substantialiter defensionis iuri cavet."

[63] Cf. *Ibid.*, 4-5, n. 8.

[64] Cf. *Ibid.*, 3, n. 5: "Ut omnes norunt, *contradicere posse* (haud secus ac dicere) ad essentiam pertinet iudicialis processus, ita ut contradicendi facultate ablata seu denegata, sententia causam definiens necessario sit nulla."

[65] *Ibid.*, 3, n. 5: "Atqui talis publicatio [procuratoribus nempe facta] nullo modo supprimere vel tollere potest integrum ius partis ad visionem actorum, quod ius eadem pars, si vult, in persona semper exercere potest. Integrum enim semper manet parti cognoscere qualia sint acta causae, integrum manet ius partis eadem acta in persona inspicere. Deplorandus ac contemnendus igitur est usus ubi, ineunte processu, aliquis administer tribunalis a parte sollicitat constitutionem advocati ac procuratoris, nullis tamen eidem datis rationibus de sensu constitutionis procuratoris, et dein quasi furtive atque in fraude exercitii iurium partis sub praetextu constitutionis procuratoris denegatur ipsi parti visio actorum vel eadem certior non est facta publicationis actorum ac proprii iuris inspiciendi acta"; cf. *Coram* McKay, 27 September 2007, B.Bis 103/2007, n. 6.

[66] Cf. *Ibid.*, 7, n. 11.

In conclusion of the case, the college of judges pointed out that the denial of the right of defence does not necessarily always arise from a single grave violation of the right of defence to be considered in isolation. In this case, the denial of right of defence has taken place by means of an accumulation of violations of the provision for the exercise of the right of defences established by law. They are namely, the lack of the respect for the right of defence, proper violations of fundamentals of processual justice and violation of the principle of equality between the parties cause the nullity of the sentence of the first instance. Therefore, the judges of the colleges exhort the first instance to conduct the process again.

3 Some Clarifications in the Light of the Rotal Sentences

As with any legal system, the frequent increase of litigation in a particular area develops the clarity of the jurisprudence with its own principles which are to be applied and followed in other cases of a similar nature which might arise in the future. This was true of the jurisprudence concerning the following areas of the judicial contentious process for the declaration of nullity of marriage. Therefore, an examination of various cases, which revolve around certain important area of the right of defence in a trial, always assists in arriving at a better clarification and understanding of the principles. These clarifications and principles, which evolve out of the cases, help the tribunal personnel for the proper and correct understanding, discretion and application of the law in the trials.

3.1 The Right of Defence by the Appointment of Curator

The general standard followed by the Roman Rota is mentioned in the Rotal decision given by Mattioli in 1965. It specifies that a curator must be appointed: 1) if in the opinion of at least one expert, such an action is necessary; and 2) when the mental deterioration is such as to be self-evident and beyond question.[67] The purpose of the designation of a curator is precisely to ensure the protection of the rights of one who

[67] Cf. *Coram* Mattioli, 30 September 1965, in *Monitor Ecclesiasticus* 92 (1967), 323.

cannot exercise these rights as different from the advocate who assists one who is capable of exercising his/her rights. The designation of a curator for a party who does not lack procedural capacity can render the sentence irremediably null as this denies the party's proper exercise of the right of defence.[68]

Pinto, in his Rotal decision, continues to refuse to grant in favour of the nullity of judgements, where there remains a doubt regarding a party's right to stand in court.[69] At times, the Supreme Tribunal of the Apostolic Signatura has been approached concerning the non-appointment of curators. The Apostolic Signatura in 1968 replied that where there is a doubt concerning the capacity to stand in court, the judgements of the courts do not labour from any nullity.[70] Clearly, then, a curator is to be appointed only for a person who is legally in need of one. The Rotal decision given by Mattioli prescribes that to make such an appointment of a curator for a person who is legally capable of acting personally is to deprive that person of the basic right of defence.[71] Therefore, there must be a true care before appointing a curator for someone. There should be a moral certitude about the lack of ability to act for oneself in the trial. If one does not lack such an ability, the appointment of a curator would result in a null sentence. The right to stand in court belongs to natural law. Therefore, laws which restrict the free exercise of rights are to be interpreted strictly (cf. can. 18). Laws, even invalidating or incapacitating, do not oblige when there is a doubt of law (cf. can. 14). With regard to the violent nature of the respondent in the trial, Rotal judge, Colagiovanni,

[68] Cf. *Coram* Corso, 28 February 1990, *RRDecr.*, Vol. 8 (1990), 50-51, nn. 9-10.

[69] Cf. *Coram* Pinto, 28 April 1977, in *Monitor Ecclesiasticus* 103 (1978), 403-413; Id., 12 December 1980, in *Monitor Ecclesiasticus* 107 (1982), 18-27.

[70] Cf. STAS, Reply, prot. 377/68E (24 April 1968), in *CLD*, Vol. 7, 938-939.

[71] Cf. *Coram* Mattioli, 30 September 1965, 323-326; R. Gołębiowski, "Il curatore processuale nella giurisprudenza rotale", in J. Kowal – J. Llobell (eds), '*Iustitia et iudicium*'. *Studi di diritto matrimoniale e processuale canonico in onore di Antoni Stankiewicz* (Studi Giuridici 89), Vol. 3, LEV, Città del Vaticano 2010, 1674; L. Barolo, *Il curatore ad cautelam nelle cause di nullità matrimoniale. Aspetti dottrinali e giurisprudenziali*, Pontificia Università Lateranense, Roma 2001, 116-118.

prescribes that the judge could declare the respondent absent, if he foresees any real harm for the plaintiff due to the summons. He stipulated that, in circumstances like these, a curator could be appointed in order to protect the right of defence.[72]

The nullity of several judgements has been challenged in amentia or similar cases, where a curator had not been appointed and therefore there was a denial of the right of defence of the one who was considered incapable of standing in court. In one such case, Rotal judge, Mattioli, decreed:

> [...] not all mental illness in whatever degree of disease, necessarily and certainly render the patient incapable of personally standing in court [...]. A curator must be appointed at any stage of the trial and in any phase of the said trial as soon as the patient's condition requires such action in the opinion of at least one expert, or without an expert where the mental deterioration is such as to be self-evident and beyond question. Wherefore, as long as there is no evidence of absolute necessity, or doubt exists, nullity of the proceedings cannot safely be concluded.[73]

The above decision was challenged and on December 2, 1965, a decision was given that there was no proof of nullity of judgement and hence no denial of the right of defence. The judges declared that the dubious capacity must be considered certain. In case of doubt, the law of appointing a curator does not urge. Rotal judge, Mattioli, decrees, "capacity to stand in court belongs to members of the Church by natural law itself and must be held inalienable as long as the opposite is not strictly and certainly proven."[74] The Roman Rota continues to refuse to

[72] Cf. *Coram* Colagiovanni, 30 March 1993, *RRDecr.*, Vol. 11 (1993), 44-50.

[73] *Coram* Mattioli, 30 September 1965, 323: "[...] non omnes mentis infirmitates in quocumque morbis gradu, *necessario* ac certo inhabilem faciunt patientem ad standum per se in iudicio [...]. Curator, nempe, necessario constitui debet in quolibet judicii gradu, et in qualibet eiusdem judicii phasi, statim ac requiritur a patientis conditione, audito quidem saltem unius periti voto, et, vel etiam nemine audito, si deordinatio mentis in infirmo, talis sit ut etiam prophanis sine contestatione pateat. At, quoadusque absoluta necessitas non appareat, vel res dubia maneat, pro nullitate actorum tuto concludi nequit."

[74] *Ibid.*, 324: "E contra, habilitas ad standum in judicio, cum proveniat Ecclesiae membris ex ipso naturali jure, inalienabilis haberi debet, quoadusque oppositum stricte atque certe non probetur."

grant in favour of the nullity of judgements, where there remains a doubt concerning a party's right to stand in court.

3.2 The Right to an Advocate

The infringement of right of defence would take place when the judge impedes or denies a party the right to an advocate. This could happen either when the party has requested an advocate and is not given the list of qualified advocates or offered an advocate or when the party has requested gratuitous juridical representation and no response is made to the request.[75] However, the judge's neglect in offering an advocate after one has been requested may not amount to nullity of the sentence when the party is too passive.[76] The absence of an advocate does not in itself amount to a denial of the right of defence[77] because the presence of an advocate and one's technical protection of one's rights are not essential elements of the right of defence.[78] Nor is the non-admission of a particular person as advocate a denial of the right of defence, as the advocates must be admitted by the competent authority to act before the tribunal (cf. can. 1483, *DC* art. 105 §§1-2).[79] The judge may appoint an advocate *ex officio* if he considers this to be necessary. The *CIC* 1983 does not prescribe to the judge when this is necessary; it is up to the discretion of the judge. Hence, his failure to appoint an advocate when this is necessary or should have been deemed necessary does not amount to the denial of the right of defence. The

[75] Cf. *Coram* Colagiovani, 29 March 1990, *RRDecr.*, Vol. 8 (1990), 77, n. 8; *Coram* De Jorio, 23 November 1966, *RRDec.*, Vol. 58 (1966), 843, n. 7.

[76] Cf. *Coram* Pombedda, 27 February 1984, *RRDec.*, Vol. 76 (1984), 123, n. 8. In this case, though the party requested for an advocate, the judge did not appoint an advocate. This defect, though pertains to the denial of the right of defence only formally and not substantially. The woman respondent could have been more active and appointed an advocate for herself.

[77] Cf. *Coram* Funghini, 20 May 1992, *RRDecr.*, Vol. 10 (1992), 97, n. 7: "[...] absentiam advocati in causa nullitatis matrimonii de se non inducere nullitatem sententiae." This also includes that even when the party does not choose to appoint an advocate. There can be no equivocation between the denial of the right of defence and the non-appointment of an advocate; *Coram* Anné, 1 February 1964, *RRDec.*, Vol. 56 (1964), 75, n. 2.

[78] Cf. *Coram* Colagiovanni, 29 March 1990, *RRDecr.*, Vol. 8 (1990), 74-77, nn. 3-4, 8.

[79] Cf. *Coram* Erlebach, 12 April 2002, *RRDecr.*, Vol. 20 (2002), 47, n. 3.

advocate has the right to freely carry out his technical function without being accountable to his client. If the party makes a complaint that the advocate was not in contact with the party, it does not amount to the denial of the right of defence. It is also the duty of the party to keep up the contact with his/her juridical representative. When the advocate is not effective in fulfilling his function, the party's right of defence as a rule is not denied since the party always retains his right of defending himself/herself personally. Moreover, the complaint by the party that the advocate is not adequately an expert in canon law does not have an impact on the validity of the sentence for the assessment of the advocate depends on the competent authority who governs the tribunal.[80]

3.3 The Right of Defence and the Defender of the Bond

The defender of the bond is bound by office to propose and explain everything which reasonably can be brought forth against nullity or dissolution (cf. can. 1432; *DC* art. 56 §3). Therefore, in defending the bond of marriage, he can present reasonable arguments against the merits of the petition and the proofs gathered in the case and point out any violations of the procedural regularities on the part of the tribunal personnel. However, he neither represents the parties nor acts for the defence of the rights of the respondent. Since the defender of the bond is to propose and explain everything which reasonably can be brought forth against nullity or dissolution, he defends the marriage bond because of his public function and not by mandate of the respondent.

Roman Rota in several cases declared the irremediable nullity of sentences due to the denial of the right of defence to a respondent, despite the intervention of the defender of the bond in the case. Rotal judge, Burke, in his decision upheld:

> Even if the defender of the bond conscientiously fulfills his mission, this does not necessarily coincide with the right of defence of the respondent, nor does the defender of the bond have as keen a personal interest in the matter as does the respondent.[81]

[80] Cf. *Coram* Ferreira Pena, 9 April 2003, B.Bis 33/2003, n. 6 (Unpublished).

In this case, before the Rotal *turnus*, the respondent in her plaint of nullity to the appellate tribunal stated that an advocate was not appointed for her. However, the appellate tribunal replied that the defender of the bond was fully able to defend her interests in the case. When the case came to the Roman Rota, the Rotal judges declared that even if the defender of the bond conscientiously fulfills his duties, it will not amount to the right of defence of the respondent.[82] Therefore, we can conclude that the right of defence belongs to the respondent and not to the defender of the bond. However, it is made evident that the defender of the bond enjoys the right of defence of the bond. Hence, if the procedural rights of the defender of the bond are not respected or given due regard, it can amount to the nullity of sentence.[83]

3.4 The Citation of the Respondent

The right of defence arises with the citation of the respondent and it is the foundational moment of the whole process. The requisite of the

[81] *Coram* Burke, 11 June 1992, *RRDecr.*, Vol. 10 (1992), 117, n. 16: "Etiam si Defensor vinculi proprium munus pro conscientia adimplet, hoc non necessarie coincidit cum defensione iurium partis conventae; nec ille tam personale interesse in re ac ipsa pars conventa habet."

[82] Cf. *Ibid.*

[83] Cf. *Coram* Stankiewicz, 20 January 1983, in *Monitor Ecclesiasticus* 109 (1984), 250, n. 9: "[…] graviore adhuc laborat defectu substantiali sententia appellata cum revera desit ius defensionis, quod attinet ad ipsum vinculum matrimoniale." There is other sentence which speak of the denial of right of defending the bond because the marriage was delared null on a ground never established in the formula of the doubt and without the intervention of the defender of the bond on that ground, cf. *Coram* Pinto, 23 October 1998, *RRDecr.*, Vol. 16 (1998), 316, n. 3. However, G.P. Montini opines differently and states that the defender of the bond has a position equal to the party and therefore lack of publication of the acts to the defender of the bond can cause irremediable nullity for the denial of the right of defence; G.P. Montini, "La nullità insanabile per denegato diritto di difesa (can. 1620, 7°) e il difensore del vincolo", in *Periodica* 102 (2013), 339: "Pare che in ordine alla pubblicazione degli atti il difensore del vincolo si trovi in una posizione identica a quella delle parti-coniugi, così che la mancata pubblicazione degli atti al difensore del vincolo *possa* configurare la nullità insanabile per negato diritto di difesa"; *Coram* Caberletti, 4 July 2017, in *Quaestiones selectae. De re matrimoniali ac processuali*, (Annales 6), LEV, Città del Vaticano 2018, 477-479, n. 4.

citation is motivated in the Rotal jurisprudence by the undeniable faculty of natural right to know what actions are levelled against their status of life so that they can have the opportunity to defend themselves.[84] The natural right of defence does not allow a judge to judge anyone without offering a due hearing.[85] Rotal judge, Staffa, states:

> Summons for trial, [...] a legitimate act by which someone is summoned to trial by order of the judge in order to prove a right, is necessarily required not only by positive law but also by natural law, because citation concerns natural defence, and it is not to be denied to anyone, because no one should be condemned without being heard. Hence, citation is said to be the beginning and foundation of a trial, that is, the very first part of the trial [...].[86]

Rotal judge, Arellano Cedillo, in 2010, argues, "defect of legitimate citation is equivalent to denial of the right of defence."[87] The lack of citation was always identified with the negation of the right of defence and as such the sentence was declared null in an offence to the natural right.[88] The right of defence also can be neglected by way of illegitimate and unjust declaration of the absence of the respondent from the trial. The material purpose of the citation is to intimate the respondent regarding the danger of infringing personal right. Therefore, if the party has not been cited and yet the respondent presents himself in the trial, the defect of citation would be *ipso facto* sanated[89] and the question of nullity due to

[84] Cf. *Coram* Serrano Ruiz, 1 July 1988, *RRDecr.*, Vol. 6 (1988), 157, n. 2.

[85] Cf. *Coram* Fagiolo, 30 October 1968, *RRDec.*, Vol. 60 (1968), 713; *Coram* Jullien, 8 February 1936, *RRDec.*, Vol. 28 (1936), 118.

[86] *Coram* Staffa, 30 October 1953, *RRDec.*, Vol. 45 (1953), 635: "Citatio enimvero, [...] seu quatenus est actus legitimus, quo suis ex mandato Iudicis vocatur in iudicium, iuris experiundi causa, nedum positivo iure, sed etiam naturali, necessario requiritur, quia citatio spectat ad naturalem defensionem, sicque nullit est deneganda, cum nemo inauditus, condemnari debeat. Unde citatio dicitur esse principium ac fundamentum iudicii, seu prima pars iudicii [...]"; cf. *Coram* Cedillo, 25 March 2010, in *Studia Canonica* 47 (2013), 210, n. 5.

[87] *Coram* Cedillo, 25 March 2010, 210, n. 5: "Defectus citationis aequivalet defectui vel denegationi iuris defensionis."

[88] Cf. *Coram* Bruno, 21 June 1985, Prot. 14.271, n. 6; *Coram* Corso, 17 October 1990, *RRDecr.*, Vol. 8 (1990), 143, n. 3.

[89] Cf. *Coram* Sebastianelli, 28 January 1918, *RRDec.*, Vol. 10 (1918), 13.

lack of valid citation would not arise.[90]

Therefore, the citation is rooted in the natural right of defence and it is the foundation of the right of defence of the respondent in the trial.[91] Even when the respondent is not cited and when he/she spontaneously presents himself in the trial, there is no violation of the right of defence. The citation is always connected to the right to be heard and defend oneself.[92] Even in the case of the petitioner giving a wrong address of the respondent due to which if the tribunal could not rightly cite the parties and conduct the instruction, it should be considered as denial of the right of defence of the respondent.[93]

3.5 The Notification of the Formula of Doubt

Once the judicial vicar has heard the parties and the defender of the bond, he defines the *formula dubii*. According to the prescripts of the norm of cann. 1513 §3 and 1676 §2 (cf. *DC* art. 135 §4), the decree of the judicial vicar, which defines the formula of doubt, must be sent to the parties and the defender of the bond.[94] Bottone observes that the right

[90] Cf. *Coram* Di Felice, 14 April 1973, in *Monitor Ecclesiasticus* 99 (1974), 190, n. 2.

[91] Cf. *Coram* Jaeger, 1 March 2011, B.Bis 28/2012 (Unpublished).

[92] Cf. *Coram* Cedillo, 12 March 2015, B.Bis 40/2015, n. 6 (Unpublished): "Ius defensionis generaliter sumptum duo elementa singillatim complectitur: a) *ius ad defensionem*, quod iudicem astringit ad praemonendam utramque partem, ope notificationum, de factis iuridicis in iudicium deductis, seu de capitibus nullitatis matrimonii, de probationibus inductis et acquisitis ac de prolatis decisionibus; b) *ius ad auditionem*, quod iudicem adigit ad praestandam utrique parti facultatem sive dicendi et contradicendi factis et decisionibus, sive inducendi probationes et exhibendi defensiones. Haec duo elementa iuris defensionis inter se intime coniunguntur, quorum prius indolem passivam habet, quia aliam partium activitatem non requirit nisi animi depositionem ad recipiendas notificationes, dum alterum indole activa pollet, quia partium activitatem requirit, quae receptionem notificationum consequitur."

[93] Cf. *Coram* Jaeger, 22 July 2014, B.Bis 119/2014 (Unpublished): In this case, the petitioner provided the wrong address of the respondent. The tribunal cited in fact the respondent to the wrong address. As there was no reply from the respondent, they declared the respondent absent and went ahead with the instruction of the case. Eventually, when the respondent woman did know that that her marriage was declared null, appealed against the sentence and Rota declared the sentence null due to the violation of the right of defence and *contradictorium*.

[94] Cf. *Ibid.*

of defence is protected in a trial when the formula of doubt is defined according to the prescripts of the law.[95] Once the formula of doubt is defined, it is to be communicated to the parties as it is not always necessary to be the same as what is alleged in the petition. Therefore, the failure to communicate to the parties the formula of doubt would infringe the right of the parties and violate their right of defence since the parties do not know what they are contesting.[96] The Rotal decisions have always upheld the nullity of the sentence in the event of the formula of doubt not being communicated to the parties. Sabattani declared a Rotal decision by Stankiewicz[97] irremediably null on the basis of violation of right of defence. The eleven judge panel of the Supreme Tribunal of the Apostolic Signatura found the following procedural violations in that Rotal decision by Stankiewicz: the respondent had not been notified of the formula of the doubt and the conclusion of the case and was thus denied the opportunity of presenting evidence and defence, and finally was not granted the faculty to respond to the allegations and defence of the other party.[98] Also Rotal judge, Corso, declared a sentence null due to the denial of the right of defence by not communicating to the parties the decree of the formulation of doubt.[99] However, Rotal judge, Erlebach, opines that violation of the

[95] Cf. *Coram* Bottone, 13 May 2004, Prot. 18/441, n. 7.

[96] Cf. *Coram* Pinto, 25 February 2011, B.Bis 21/2011 (Unpublished); STAS, Decree *congressus*, prot. 27000/96 CG (18 December 1996) (unpublished)

[97] Cf. *Coram* Stankiewicz, 17 January 1982, in *Ephemerides Iuris Canonici* 39 (1983), 255-265.

[98] Cf. STAS, *Coram* Sabattani, 17 January 1987, in *Periodica* 77 (1988), 348-349, nn. 22: "a) Neglecta et omissa est notificato parti conventae formulae qua dubium fuit dei 17 decembris 1981 concordatum. […]. b) Neglecta et omissa est notificatio conclusionis in causa. […]. c) Neglecta est, immo non concessa parti conventae, facultas seu possibilitas concreta exhibendi proprias allegationes et defensiones, atque respondendi allegationibus partis adversae. […]. d) Neglecta est, immo non concessa, parti conventae facultas seu possibilitas concreta respondendi allegationibus et defensionibus actoris."

[99] Cf. *Coram* Corso, 16 January 1990, *RRDecr.*, Vol. 8 (1990), 10, n. 10: "Non constat vero in praesenti casu de notificatione decreti concordationis dubii [...]. Concludendum est ergo nullitate reapse insanabili laborare sententiam secundi gradus […] ob denegatum ius defensionis de quo expresse in can. 1620, 7°, eo quod unquam communicaverit Tribunal cum parte conventa decreta praecipue concordationis dubiorum et publicationis actorum necnon et ipsam sententiam definitivam."

right of defence caused by omission of the communication of the formula of doubt may be sanated when the party later comes to learn the grounds during the course of the instruction or during the publication of the acts.[100]

3.6 The Right of Defence and the Publication of the Acts

In connection with the publication of the acts, the right of defence is the topic most frequently mentioned in many Rotal decisions.[101] Many Rotal judges have held that this right to inspect the acts during the publication of the acts is prerequisite for justice which is rooted in natural law.[102] Stankiewicz states in his decision that the right of defence consists of two elements; namely the right to contradict and the right to a judicial hearing.[103] In another decision, he states that the prescript of the publication of the acts is not a grave obligation, but required under a sanction of nullity.[104] Therefore, a defect in the publication of the acts results in the irremediable nullity of the sentence due to the denial of the right of defence. According to him, the substantial violation of the right of defence takes place 1) when the adversarial party is not able to offer a *contradictorium* because of the conduct of the tribunal, 2) when one is not able to oppose the proofs which have been gathered, 3) when one is not able to present his/her own side of the story in court, 4) when one is not

[100] Cf. *Coram* Erlebach, 12 April 2002, 51, nn. 10-11.

[101] Cf. *Coram* Mannucci, 27 February 1930, 117-125; *Coram* Lefebvre, 9 February 1974, *RRDec.*, Vol. 66 (1974), 64-70; *Coram* Raad, 30 May 1974, *RRDec.*, Vol. 66 (1974), 398-404; *Coram* Ferraro, 25 November 1975, *RRDec.*, Vol. 67 (1975), 661-668; *Coram* Davino, 1 April 1976, *RRDec.*, Vol. 68 (1976), 160-163; *Coram* DiFelice, 25 February 1978, *RRDec.*, Vol. 70 (1978), 106-111; *Coram* Stankiewicz, 25 February 1982, in *Monitor Ecclesiasticus* 108 (1983), 306-312; *Coram* Arokiaraj, 13 October 2009, B.Bis 122/2009 (Unpublished); *Coram* Esteban, 25 March 2015, B.Bis 41/2015 (Unpublished); *Coram* McKay, 24 April 2015, B.Bis 53/2015 (Unpublished); *Coram* Erlebach, 16 July 2015, B.Bis 102/2015 (Unpublished); *Coram* Monier, 14 December 2016, in *Quaestiones selectae. De re matrimoniali ac processuali* (Annales 6), LEV, Città del Vaticano 2018, 453-456.

[102] Cf. *Coram* Brennan, 27 November 1958, *RRDec.*, Vol. 50 (1958), 659-667; *Coram* Davino, 1 April 1976, 160-163; *Coram* Stankiewicz, 20 January 1983, 244-257.

[103] Cf. *Coram* Stankiewicz, 20 January 1983, 244-257, n. 8: "Substantia autem iuris defensionis duobus constat elementis, iure nempe ad contradictorium et iure ad auditionem iudicialem."

[104] Cf. Id., 26 October 1990, 156, n. 2.

able to present arguments about the contested issue in court.[105] Di Felice and Wynen have also established that the principle of *contradictorium* in a judicial process is related to the publication of the acts.[106] It is the integral right of the party to know the proofs.[107]

3.7 The Distinction Between *DC* and *CIC* 1983

DC art. 230 prescribes, "in order to avoid serious dangers, the judge can decree that some act is not to be shown to the parties, with due care taken however that the right of defence remains intact."[108] On the contrary, can. 1598 §1 reads "in cases pertaining to the public good to avoid a grave danger, the judge can decree that a specific act must be shown to no one; the judge is to take care, however, that the right of defence always remains intact."[109] The canon reads that some acts are to be shown to "no one" (*aliquod actum nemini manifestandum esse*) whereas the *DC* reads that some acts are not to be shown "to the parties" (*aliquod actum partibus manifestandum non esse*).

According to the innovations made by the *DC* based on the Rotal jurisprudential principles, the acts could be held back from the parties, but not from the advocates. This protects the right of defence of the parties. This modification that is found in *DC* is the result of the jurisprudence and its principles. One of the ways in which the right of defence can be

[105] Cf. Id., 22 November 1984, 320-327, n. 5: "Quare substantiali iure defensionis is certo spoliatus habetur, qui nec actioni a parte adversa in iudicium deductae contradicere valuit ob agendi rationem ipsius tribunalis, nec probationes tempore instructionis collectas impugnare, nec propriam declarationem iudicialem facere, nec argumenta exhibere quoad factum circa quod iudicium versabatur."

[106] Cf. *Coram* DiFelice, 25 February 1978, 106-111; *Coram* Wynen, 9 March 1955, *RRDec.*, Vol. 47 (1955), 217-226.

[107] Cf. *Coram* Stankiewicz, 20 January 1983, 244-257, n. 8.

[108] *DC* art. 230: "Ad gravissima autem pericula evitanda, iudex decernere potest aliquod actum partibus manifestandum non esse, cauto tamen ut ius defensionis semper integrum maneat (cf. can. 1598 §1)."

[109] Can. 1598 §1: "In causis vero ad bonum publicum spectantibus iudex ad gravissima pericula evitanda aliquod actum nemini manifestandum esse decernere potest, cauto tamen ut ius defensionis semper integrum maneat."

balanced with the capacity to withhold some acts from publication is to make use of the advocate. The use of an advocate in dangerous situations requires that the one appointed actually functions as an advocate. That is to say, the one appointed must take care to argue for the position of the client, to see to it that the client knows the issues and the evidence and to take advantage of the cognizance of the client in framing the arguments to be used in opposing the position of the other party. For example, the Rotal judge, Pinto, provides an additional means by which an individual can exercise this right through the appointment of an advocate.[110] When the appointed advocates inspect the acts, there is no violation of the right of defence. In fact, the letter of the Supreme Tribunal of the Apostolic Signatura indicates that if an act is withheld from publication and the sentence depends upon it, the services of a professionally-functioning advocate should be employed in order to protect the right of defence.[111] Rotal judge, Giannecchini, observes that the parties and their legal representatives have the right to know all the proofs adduced by the other party, not excluding those which according to the norm of law have to be kept secret.[112] Corso argues that publication of the acts has to be done to the curator, when the curator has been appointed to a party.[113]

3.8 The Nullity of a Sentence Founded on Unpublished Acts

In the publication of the acts, the right of defence is most often diminished by withholding an act or certain acts from publication. It is the responsibility of the adjudicating tribunal to decide if the evidence, which has been withheld, seriously affects the right of defence. Before *CIC* 1983, a clearly stated principle is found in the jurisprudence that the definitive sentence should not rest on unpublished material. This is categorically

[110] Cf. *Coram* Pinto, 29 July 1978, A. 150/1978 (unpublished).

[111] Cf. STAS, Letter, prot. 24053/93 V.T. (22 June 1993), n. 6.

[112] Cf. *Coram* Giannecchini, 23 May 1989, *RRDecr.*, Vol. 7 (1989), 95, n. 2; *Coram* De Lanversin, 18 December 1986, *RRDecr.*, Vol. 4 (1986), 180, n. 7.

[113] Cf. *Coram* Corso, 28 February 1990, 49, n. 7.

stated in a decision authored by Davino.[114] He states that in the case of an omission of the publication of a proof, if the sentence depends on the unpublished material, beyond doubt it must be said that the right of defence is violated. The same opinion is also vehemently supported by the sentence *coram* Arokiaraj in 2017.[115] Consequently, the sentence is vitiated by irremediable nullity. This is very strongly emphasized by the decree *coram* Arokiaraj in 2012 as well. He, while analyzing a sentence of the first grade in 2012, states that the argumental part of the judge of the first instance tribunal reiterates the expert's report in the sentence and arrives at the moral certitude based on this report. However, this expert's report is placed under secrecy during the publication of the acts. Therefore, the expert's opinion, on which the sentence is founded, is not published to the respondent and thereby denied the respondent the possibility of contradicting and defending himself. Hence, this causes the irremediable nullity of the sentence due to the denial of the right of defence.[116] The jurisprudence also indicates that at the very least, the evidence which may influence the decision of the judges or the evidence on which the sentence is founded must be published and the failure of which causes the denial

[114] Cf. *Coram* Davino, 1 April 1976, 160-163.

[115] Cf. *Coram* Arokiaraj, 13 December 2017, B.Bis. 133/2017 (Unpublished).

[116] Cf. Id., 30 May 2012, 253, n. 9: "Praeterea in parte in facto sententiae primi gradus ample lateque de relatione peritali loquitur; ex tenore expositionis argumentorum seu motivorum, quibus sententia affirmativa innititur, evincitur relationem peritalem in casu fundamentum constituisse pro eadem sententia. Tribunal primi gradus aliis verbis relationem peritalem sub secreto positam in parte in facto memoravit atque ipsa relatio certitudinem moralem in iudicibus efformavit. Sententia innititur in peritia quae numquam convento nota fuit et ipsi viro possibilitatem contradicendi et sese defendendi a Tribunali primae curae negata est. Vit conventus animadvertere nequivit super actis quae Tribunal adhibuit in sententia ideoque suum ius defensionis exercere. Hod secumfert nullitatem insanabilem sententiae ob ius defenionis denegatum"; This sentence is translated and published by A. Mendonça in *Philippine Canonical Forum* 15 (2013), 245-254: The argument part of the judge of the first instance tribunal reiterated the expert's report in the sentence and arrived at the moral certitude based on this report. However, this expert report was placed under secrecy during the publication of the acts. Therefore, the expert's opinion, on which the sentence is founded, is not published to the respondent and thereby denied the respondent the possibility of contradicting and defending himself. Hence, this causes the irremediable nullity of sentence due to the denial of the right of defence.

of the right of defence. This understanding is also articulated in the Rotal jurisprudence of De Lanversin,[117] McKay[118] and Giannecchini.[119]

3.9 The Two Conditions to Limit the Publication

Pinto indicates the limitation of the publication of the acts under two conditions: 1) it is limited to some proof; and 2) it must be necessary to avoid a very serious danger. The fear that no witness would be willing to testify if they know that a particular party would have access to the evidence is insufficient.[120] The fear of possible problems in the future is not considered to be a reason to withhold an act from publication and the grave danger must be a concrete one and not an abstract one.[121]

Rotal judge, Colagiovanni, while confirming the immediately preceding Rotal decision, which had overturned the previous Rotal decision, which had declared the first instance sentence irremediably null on the grounds of substantial violation of the right of defence due to the non-publication of the acts to the respondent, upholds the validity of the first instance decision, even though it is clearly established that the respondent is not permitted to inspect the acts of the case. In his decision, Colagiovanni argues that the threats from the respondent implies serious harm to the tribunal as well as to the good of the particular Church.[122]

[117] Cf. *Coram* De Lanversin, 18 December 1986, n. 8.

[118] Cf. *Coram* McKay, 24 April 2015, B.Bis 53/2015 (Unpublished); *Coram* Graulich, 13 January 2014, B.Bis 3/2014 (Unpublished): The sentence is exclusively based on an experts's report which was not published to the party during the publication of the acts. Therefore, the Rotal judge declares the sentence of the first instance null as the sentence is founded on the expert's report.

[119] Cf. *Coram* Giannecchini, 26 March 1987, *RRDecr.*, Vol. 5 (1987), 53, n. 2: "Quoties enim probationes in toto ad normam legis (cf. can. 1598 §1) non publicantur aut alteri parti, praeter culpam, etiam partialiter secretae manserint, sententia in eis fundata vitio nullitatis ex defectu legitimae defensionis laborat"; *Coram* Caberletti, 4 July 2017, B.Bis 77/2017 (Unpublished).

[120] Cf. *Coram* Pinto, 24 May 1984, in *Monitor Ecclesiasticus* 113 (1988), 314-319.

[121] Cf. *Coram* Bruno, 27 March 1992, *RRDecr.*, Vol. 10 (1992), 51-52, n. 2; *Coram* Doran, 2 April 1992, *RRDecr.*, Vol. 10 (1992), 60, n. 6.

[122] For a full discussion of this case: cf. A. Mendonça, "The Right of the Parties to Inspect the Acts and Its Relation to the Validity of a Definitive Sentence in a Marriage Nullity Process", in *Studia Canonica* 33 (1999), 293-347; *Coram* Colagiovanni, 30 March 1993, 44-50.

3.10 The *De facto* or Concrete Possibility of Defence

The principle of the Rotal jurisprudence makes a very clear distinction between the *de facto* and the possibility of the defence. The Rotal jurisprudence also makes it clear that the judicial necessity for the publication of the acts, which is from the natural law, does not require that the acts be reviewed by the parties. It simply requires that they have the real possibility of reviewing the acts of the case. This is very well articulated in the sentence *coram* Wynen.[123] Therefore, in his decision, he makes the distinction between the *de facto* necessity of a defence and the possibility of the defence. He elucidates this point by arguing that the parties must be given the possibility of defending themselves with the necessary amount of time to take advantage of that possibility. The natural law does not state that they must necessarily take advantage of the possibility.[124] The same principle is also found in the decision of Huot who articulates that the publication does not impose a requirement that the acts be reviewed, but only that the parties and their legal representatives have the possibility of reviewing the acts and if they wish they can also present a defence.[125] In this case, he states that there did not appear any formal publication of the acts and the parties did not have the possibility of reviewing the acts and declared the nullity of the process based on the denial of the right of defence of the parties.

Regarding the delicate issue of confidentiality, Burke in his decision in 1992 categorically upholds the significance of the just process. He indicates that the element of confidentiality is to be clearly subordinate

[123] Cf. *Coram* Wynen, 9 March 1955, 217-226.

[124] Cf. *Ibid.*, n. 8: "Si quidem ius naturale, licet non postulet ut partes *de facto* suam causam defendant, tamen exigit ut partibus praebeatur *possibilitas* defensionis, qua possibilitate partes privantur, si eis non datur tempus necessarium."

[125] Cf. *Coram* Huot, 12 February 1982, n. 7 (Unpublished): "Haec formalitas a iure omnino requiritur (cf. can. 1858 et 1859; Instr. *Provida Mater*, art. 134 et 175). Nulla tamen imponitur a iure sollemnitas sed tantum *possibilitas* partibus earumve patronis acta inspiciendi, defensionemque, si voluerint, instaurandi atque exhibendi (cf. *Coram* Anné, 13 February 1968, *RRDec.*, Vol. 60 (1968), 90)."

to the tribunal's actual duty to safeguard due process in the present trial. The court cannot sacrifice the justice and integrity to the delicate issue of confidentiality.[126] Therefore to invert priority, that is to allow witness' relative right to confidentiality to take precedence over the party's absolute right to publication is to run the gravest danger of provoking the nullity of a sentence.

3.11 The Omission of the Discussional Phase

The principle of the *contradictorium* gains an important momentum in the discussional phase. Without this discussional phase, the principle of the *contradictorium* will be infringed.[127] The principle of the *contradictorium* is closely connected to the right of defence as *contradictorium* renders the exercise of the right of defence more effectively. According to can. 1599 §3 (*DC* art. 237 §3) when the case is concluded after sufficient instruction, the judge is to issue the decree of conclusion and set up the discussional phase determining a suitable period of time for the presentation of the pleadings and the observations. This phase concerns the essential and substantial part of the trial and therefore its denial or omission would deny the exercise of the right of defence due to the infringement of the principle of the *contradictorium*.[128] The essential right of defence includes not only proposing the proofs but also the arguments against.[129] "Therefore, because

[126] Cf. *Coram* Burke, 11 April 1992, in *Studia Canonica* 26 (1992), 490-496.

[127] Cf. *Coram* Erlebach, 26 July 2016, in *Quaestiones selectae. De re matrimoniali ac processuali* (Annales 6), 447, n. 2: "Sub aspectu dynamicae processualis, principium contradictorii maximum obtinet momentum in phasi discussoria. Nemo est ergo qui non videat, hanc phasim pertinere ad iudicii essentiam. Qua re, 'si […] iudex omnino non concederet phasim discussoriam vel substantialiter eam everteret, iam ex ipsa laesione essentialis principii contradictorii scateret sententiae nullitas' (*Coram* Erlebach, 2 May 2013, *Periodica* 102 (2013), 507, n. 6)."

[128] Cf. *Ibid.*, 449, n. 6.

[129] Cf. *Ibid.*, 447, n. 3: "Essentia iuris defensionis comprehendit non solum facultatem adducendi probationes sed etiam illam manifestandi argumenta a partibus in causa"; *Coram* Salvatori, 19 February 2015, B.Bis 20/2015, n. 5: "Enimvero «non omnes actus processuales sunt essentiales ad iuri defensionis praecavendum, iurisprudentia enim distinguit inter actus accidentales et substantiales, seu qui defensionis substantiam pertingunt» (*Coram* Alwan, decr. diei 17 februarii 2009, B.Bis 27/2009, n. 5). Si una ex parte difficiles inventu actus processuales qui ad essentiam iuris ad contradictorium et iuris ad auditionem pertinent, ex altera non impossibiles. Etenim

the presentation, not only of the proofs, but also of the arguments, pertains the essence of the right of defene, one can admit that the discussional phase of the process is of the essence of the trial."[130] The discussional phase paves the way for this provision. Therefore, the omission of discussion would lead to the denial of the right of defence.

3.12 The Right of Defence and the Publication of Sentence

The publication of the sentence is a passive moment in the process, pertaining to the right to information to use the expression of Rotal judge, Stankiewicz.[131] After having been redacted, the sentence needs to be published. It is only after it has been published that a judgement has any juridical effect.[132] When a sentence is not published, the right of defence has been denied to the parties. This consideration that the lack of publication is a denial of the right of defence is analyzed in the decree of the Rotal judge, Colagiovanni, who clearly defines the intimate relationship between the absence of such publication and the violation of the right of defence.[133] When it is not published, the party is deprived of the right to information and cannot exercise his/her *ius impugnandi*, the right to challenge the sentence. In this sense, publication of the sentence

elementa quae ad essentiam pertinent ad haec perstringi videntur: a) ius in iudicium vocari; b) ius ad obiectum controversiae cognoscendum; c) ius ad probationes adducendas vel contradicendas, ubi usque ad decretum conclusionis in causa partes iura ample agere possunt, sed postea secundum quid (cf. can. 1600); d) ius sese defendendi in phasi discussoria."

[130] *Coram* Erlebach, 9 April 2013, 585, n. 4: "Cum ergo non solum exhibitio probationum, sed etiam argumentorum, pertineat ad essentiam iuris defensionis, admitti potest quod phasis discussoria processus est ad essentiam iudicii contentiosi."

[131] Cf. *Coram* Stankiewicz, 27 May 1994, 120, n. 10: "quorum prius seu 'ius ad informationem' indolem passivam habet [...]."

[132] Cf. L. Chiappetta, *Sommario di diritto canonico e concordatario*, Edizioni Dehoniane, Roma 1994, 1125-1126: "E come la legge 'instituitur cum promulgatur' (can. 7) così la sentenza pronunciata dal giudice acquista efficacia giuridica quando viene pubblicata ossia debitamente notificata alle parti 'ad normam iuris'"; P.V. Pinto, *Commento ad codice di diritto canonico*, LEV, Città del Vaticano 2003, 920.

[133] Cf. *Coram* Colagiovanni, 21 May 1985, 122, n. 11: "Nec sententia parti conventae notificata fuit, sic iterum ius defensionis seu appellationis denegatum fuit"; G. Erlebach, *La nullità della sentenza giudiziale 'ob ius defensionis denegatum' nella giurisprudenza Rotale*, 292.

pertains to the essence of the right of defence.[134]

The sentence, when it is published and notified, must also contain both the dispositive and expositive parts of the sentence. The Rotal decisions have given due considerations to the issue of nullity of the sentence on the grounds of lack of the defect of motivation according to the norm of can. 1622, 2° (DC art. 272, 2°)[135] These decisions have clarified an essential point in order to understand the complaint of nullity enshrined in can. 1622, 2° and to understand the motivation for the decisions. An example of the latter is a decision *coram* Jullien[136] which says that a sentence without its essential elements cannot be published nor carried out and produces no effect. There are also a number of other Rotal decrees that speak of the right of defence when they discuss the problems of the motivation of the sentence. Rotal judge, Mattioli, declares the sentence of the tribunal of the first instance null because certain information, that had motivated the sentence, is not communicated to the parties and the defender of the bond, consequently rendering it impossible for them to contradict, which is essential in *iudicium ecclesiasticum*.[137] On the other hand, the decision *coram* Pinto, provides an important clarification regarding secrecy and motivation. This decision does imply that the content of the motivation could violate the obligation of the secrecy on how much it is stated in the

[134] Cf. *Coram* Faltin, 12 June 1990, *RRDecr.*, Vol. 8 (1990), 109, n. 7: "Ideoque, publicatio sententiae pertinet ad essentiam iuris defensionis. Qua, igitur, publicatione omissa, parti, cuius interest, denegatur ius defensionis, quia pars privatur appellandi, quod ius nemini laedere licet"; *Coram* Stankiewicz, 20 July 1995, *RRDec.*, Vol. 87 (1995), 506, n. 8.

[135] Can. 1622, 2°: "A judgement is null with a nullity which is simply remediable if it does not contain the motives or reasons for the decision."

[136] Cf. *Coram* Jullien, 17 June 1944, *RRDec.*, Vol. 36 (1944), 429-430: "Constabilita igitur a Iudicibus dispositiva futurae sententiae parte, causa tum definita est sed sententia nondum existit (cf. Inst. S.C. Dis. Sac. D. 15 Aug. 1936, art. 198, par. 6; art. 200, par. 1) Enimvero, uti liquet tum ex rei natura, tum ex legis textu, aliud est pars dispositiva sententiae, aliud est sententia ipsa tota, constans cunctis suis partibus definitis in canone 1873 et canone 1874, ut sunt: ex. gr. pars motiva, pars dispositiva, subscriptiones. Sine autem essentialibus suis elementis, sententia non editur, non fertur (can. 1874, par. 1) nullum effectum producit. Aliud est igitur constabiliri partem dispositivam; aliud sententiam ferri, seu exarari, subscribi, quo facto sententia existit, est edita, seu prolata, vel pronunciata."

[137] Cf. *Coram* Mattioli, 26 February 1954, *RRDec.*, Vol. 46 (1954), 175-176, n. 2.

centre of decision.[138]

The decision of the Rotal judge, Serrano declares that the right of defence can be violated, thus rendering the sentence irremediably null, if, rather than being based on the acts and the proofs of the case, it is based on the information and declaration known privately by the judge and not legitimately acquired by the acts, and to which the parties do not have the means to know and contradict them.[139] The decision of Rotal judge, Bruno[140] declares the sentence of the tribunal of the first instance irremediably null as it has failed to include the reasons for its decision, amounting to the violation of the right of defence. Therefore, the mere communication of the dispositive part of the sentence is insufficient in order to fulfill the requirement of the publication of the sentence. On the contrary, it should also contain the reasons, motives *in iure* and *in facto* which constitute the judgement. Turnaturi states that even if the party is declared absent in the trial, the sentence is to be communicated to the party, thus providing him/her the opportunity for the exercise of the right of defence.[141]

3.13 The Need for Notifying the Possibility of Appeal in the Sentence

The sentence must also notify to the parties of the possibility of lodging an appeal in the Roman Rota against the sentence of the tribunal of the first instance, as clarified in various Rotal decisions, such as the decision

[138] Cf. *Coram* Pinto, 9 November 1984, in *Monitor Ecclesiasticus* 110 (1985), 319, n. 6: "Ad praefatum secretum servandum Nos in hac sentential testium nomina plerumque non dabimus sed rettimus ad eorum depositions, citantes Summariorum paginas quolibet divulgationis periculo ita excluso."

[139] Cf. *Coram* Serrano, 15 March 1985, B.Bis 30/1985, n. 13; C. Gullo, "Il diritto di difesa", in *Monitor Ecclesiasticus* 113 (1988), 46: "Il diritto di difesa della parte può esser violato, e dar luogo a nullità insanabile quando [...] la decisione non trovi il suo fondamento "in actis et probatis" (can. 1068, par. 2), ma in informazioni e dichiarazioni privatamente conosciute dal giudice, non legittimamente acquisite agli atti (can. 1064, par. 1) e alle quali la parte non abbia potuto, non avendo potuto conoscerle."

[140] Cf. *Coram* Bruno, 27 March 1992, 50-53.

[141] Cf. *Coram* Turnaturi, 24 July 2008, Prot. N. 19/896, n. 7.

of Doran,[142] which declared null the sentence of the tribunal of the first instance for failing to intimate the possibility of the appeal in the Roman Rota against the decision. In this regard, an explicit emphasis was made by John Paul II in his allocution to the Roman Rota in 1989 in order to protect the right of defence. He says:

> In order to better guarantee the right of defence, it is obligatory for the tribunal to indicate to the parties the ways according to which the sentence can be challenged (can. 1614). It seems fitting to recall that, in the fulfilment of the task, the first instance tribunal must also indicate the possibility of approaching the Roman Rota already for the second instance.[143]

Therefore, based on this allocution to the Roman Rota and the later jurisprudence, *DC* art. 257 §2 prescribes:

> If there is the possibility for an appeal, information is to be provided at the time of the publication of the sentence regarding the way in which an appeal is to be placed and pursued, with explicit mention being made of the faculty to approach the Roman Rota besides the local tribunal of appeal.[144]

The Supreme Tribunal of the Apostolic Signatura also criticizes the tribunal's method of notifying to the parties about the sentence without specifying the required motives and the reason for the same and without informing them of their faculty to lodge an appeal to the Roman Rota. The Signatura concludes that these irregularities would compromise the right of defence.[145] Notifying the possibility of an appeal makes the party aware

[142] Cf. *Coram* Doran, 18 May 1989, *RRDecr.*, Vol. 7 (1989), 90-93; G. Erlebach, *La nullità della sentenza giudiziale "ob ius defensionis denegatum" nella giurisprudenza Rotale*, (Studi Giuridici 25), LEV, Città del Vaticano 1991, 293.

[143] John Paul II, Allocution to the Roman Rota (26 January 1989), n. 7, 925: "Per garantire ancora di più il diritto alla difesa, è fatto l'obbligo al tribunale di indicare alle parti i modi secondo i quali la sentenza può essere impugnata (can. 1614). Sembra opportuno ricordare che il tribunale di prima istanza, nell'adempimento di questo compito, deve anche indicare la possibilità di adire la Rota Romana già per la seconda istanza."

[144] *DC* art. 257 §2: "Si locus est appellationi, una cum publicatione sententiae, explicita mentione facta de facultate adeundi Rotam Romanam praetor tribunal appellationis loci, indicandus est modus quo appellatio interponenda et prosequenda est."

[145] Cf. STAS, Reply, prot. 21.163/89 V.T. (cited in D. Nau, "Publish and be Damned: One Practitioner's Experience", in *The Jurist* 51 (1991), 442-450).

of defending himself/herself, if he/she feels aggrieved, and thus provides for the platform for *contradictorium*.

3.14 The Right of Defence and the Exercise of the Right of Defence

The distinction is also to be made between the right of defence and the exercise of the right of defence. The negligence of the party or the failure of the party or the renunciation of the exercise of the right by the party does not affect the validity of the sentence on the ground of denial of the right of defence, as long as the judge had given the full faculty to the parties for exercising their right of defence. The fact that the party failed to defend himself/herself personally or through an advocate does not amount to the nullity of the sentence, if the party was given the possibility of defending himself/herself.[146]

Conclusion

The right of defence proper to the parties may be denied when the judge perpetrates a complex and serious violation of the procedural law. The judge ought to observe meticulously the procedural formalities and the canonical prescripts for the legitimate exercise of his office so that the parties will have a guaranteed faculty for the exercise of their right of defence, which finds its origin in natural law. The denial of the right of defence causes the nullity of the sentence in virtue of both natural law and positive law. This right of defence is rendered effective through *contradictorium* in the trial. According to the early and recent Rotal jurisprudence, very

[146] Cf. *Coram* Bejan, 24 October 1959, *RRDec.*, Vol. 51 (1959), 469; *Coram* Faltin, 25 May 1987, *RRDecr.*, Vol. 5 (1987), 82, n. 9: "Tandem, non ob praesumptam iuris defensionis violationem viro convento 'relative denegatum', quatenus nempe ipse incapax esset, propter iuris canonici ignorantiam, per seipsum sese defendendi, prouit asserit eiusdem viri Patronus"; *Coram* Jarawan, 25 January 1989, *RRDecr.*, Vol. 7 (1989), 10, n. 2; *Coram* Boccafola, 26 October 1989, *RRDecr.*, Vol. 7 (1989), 174-176, nn. 11-14; *Coram* Doran, 29 November 1990, *RRDecr.*, Vol. 8 (1990), 188-189, n. 6; *Coram* Giannecchini, 19 July 1991, 104, n. 2; *Coram* Bruno, 21 July 1995, *RRDecr.*, Vol. 13 (1995), 101, n. 6; *Coram* Pinto, 22 October 1997, *RRDecr.*, Vol. 15 (1997), 205, n. 4; *Coram* Erlebach, 7 May 1998, 131, n. 5; *Coram* Turnaturi, 16 May 2002, *RRDec.*, Vol. 94 (2002), 336, n. 6; *Coram* Alwan, 23 January 2003, B.Bis 2/2003, nn. 7 and 11 (unpublished).

frequently, the irremediable nullity of the sentence due to the denial of the right of defence occurs on account of not merely one procedural violation but many serious and substantial defects in the process which deprive the party of their faculty to concretely exercise the elements of *contradictorium* in order to defend themselves.[147] The concrete possibility of exercising the *contradictorium* in a trial is of paramount importance for safeguarding the right of defence of the parties.

The violation of the procedural laws pertaining to the right of defence need not always result in the denial of the fundamental natural right of defence.[148] Not any accidental defect would cause the violation of the right of defence, but only a substantial defect would lead to the violation of the right of defence and render the sentence null. For example, if every possibility of defending oneself was denied to the parties and there was no possibility for the *contradictorium* or the judicial exchange, then it amounts to the substantial defect and thereby gives rise to nullity of the sentence.[149] In concrete terms, the right of defence would refer generally

[147] Cf. *Coram* Caberletti, 4 July 2017, in *Quaestiones selectae. De re matrimoniali et processuali*, 478, n. 4: "sanctio nullitatis insanabilis, ad mentem can. 1620, 7° 'intervenire solo per la violazione sostanziale di diritto di difesa, che può essere avvenuta di fatto (anche) attraverso l'omissione della pubblicazione degli atti o una pubblicazione illegittima degli stessi. In questo caso ci si riferisce al risultato ottenuto; se il diritto alla difesa è stato garantito nei suoi elementi sostanziali la violazione delle norme poste nella pubblicazione degli atti non sono prese in considerazione; se la violazione (*a posteriori*) non rivela alcuna sostanziale violazione del diritto alla difesa, la violazione del can. 1598 §1 non è sanzionata dal can. 1620, 7° (G.P. Montini, *De iudicio contentioso ordinario. II. Pars dynamica*, Pontificia Universitas Gregoriana, Romae 1973, 353-354)"; *Coram* Falteri, 28 July 2016, 448, n. 3: "Dicta nullitas sententiae agnosci tamen nequit in casu omnibus violationum iuris defensionis. Hac in provincia sententia fit nulla solummodo in casu denegationis totalis iuris defensionis vel violationis essentialis, respicientis nempe totalem vel substantialem violationem iuris defensionis in aliqua phasi essentiali processus"; *Coram* Bejan, 24 October 1959, 468, n. 3; *Coram* Agustoni, 15 November 1983, *RRDecr.*, Vol. 1 (1983), 111, n. 6; *Coram* Funghini, 24 May 1989, *RRDecr.*, Vol. 7 (1989), 104, n. 7; *Coram* Boccafola, 26 October 1995, *RRDecr.*, Vol. 13 (1995), 123, n. 6.

[148] Cf. *Coram* Davino, 19 October 1989, *RRDecr.*, Vol. 7 (1989), 156-159: The denial of the right of defence may either amount to a substantial defect in the right of defence or it may amount merely to an incidental procedural defect.

[149] Cf. *Coram* Lefebvre, 17 July 1976, B.Bis 64/1976, n. 20 (Unpublished); *Coram* Doran, 28 April 1987, in *Diritto Ecclesiastico* 99 (1988), 27, n. 9; *Coram* Stankiewicz, 31 January 1989, *RRDec.*, Vol. 81 (1989), 93; *Coram* Colagiovanni, 11 December 1990, *RRDecr.*, Vol. 8 (1990), 198, n. 6.

to a twofold right: the right to information (*ius ad informationem*) and the right to hearing (*ius ad auditionem*)[150] which will result in *contradictorium*. These important elements have repeatedly been given emphasis in all the sentences of Roman Rota and the analysis of various Rotal sentences strongly manifests it. When the canonical provisions for the right of defence of the parties are meticulously observed by the judges in the trial, the sentence will obviously be just and fair.

[150] Cf. *Coram* Stankiewicz, 27 May 1994, 120, n. 10; Id., 20 July 1995, 505, n. 5; Id., 29 March 1996, 68, nn. 6-7; *Coram* Erlebach, 7 May 1998, 131, n. 6; *Coram* Sable, 11 January 2001, *RRDecr.*, Vol. 19 (2001), 5-6, n. 5: "Attamen dum essentia iuris 'ad informationem' in vero eius exercitio completur, sine quo ceterum defensio in iudicio perfici numquam possit, ad essentiam iuris 'ad auditionem' pertinet tantum possibilitas exercendi ius huiuscemodi, minime vero effectivum eius exercitium."